No. 147.

Brief of Dunlap & Kenna for Pltff.

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Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

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THE ATCHISON TOPEKA & SANTA FE RAILROAD COMPANY,
Plaintiff in Error,
vs.
W. T. MATTHEWS and M. L. TRUDELL, Copartners as Matthews & Trudell,
Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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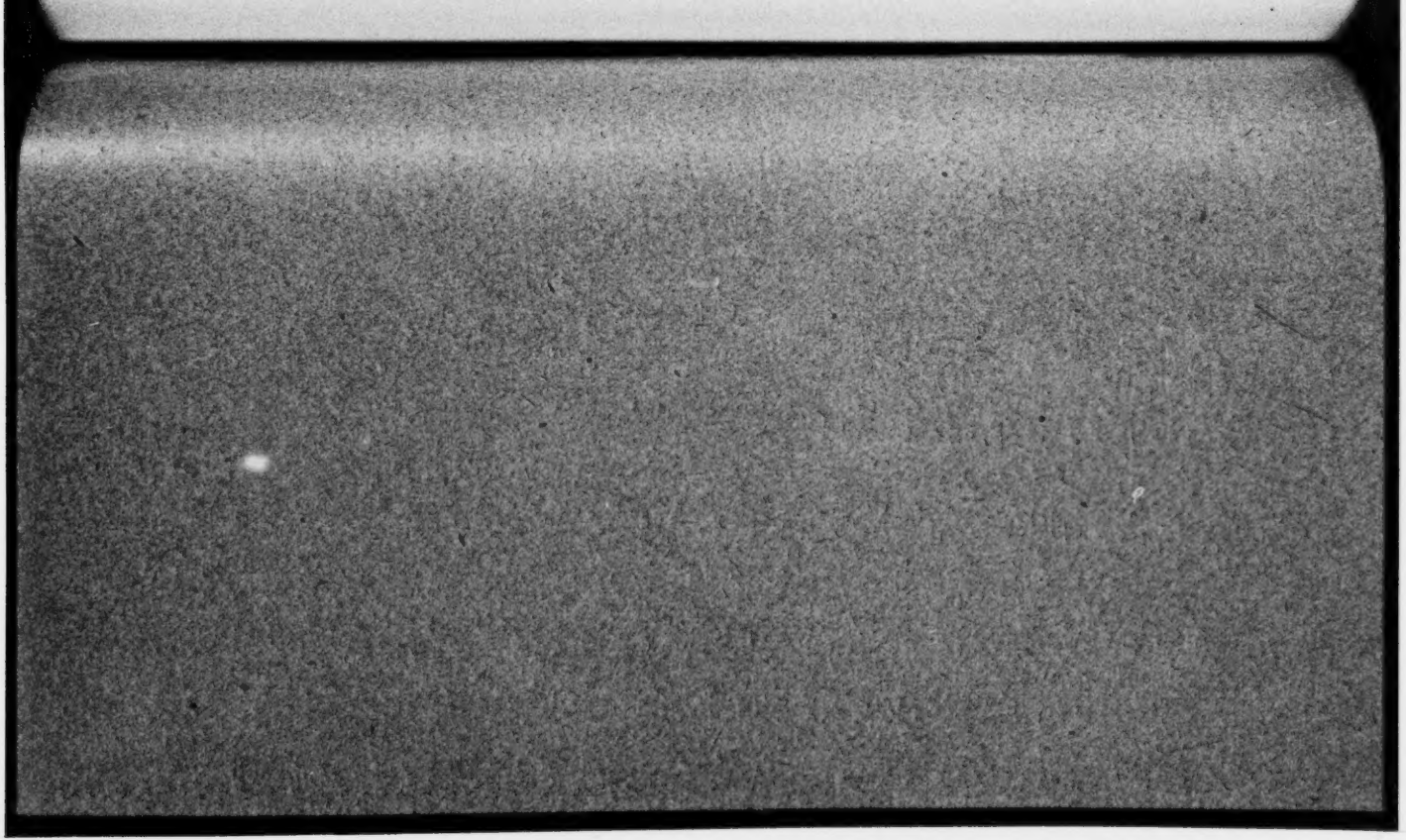

IN THE

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STATEMENT OF FACTS.

The above cause is here on writ of error to the Supreme Court of Kansas to review the judgment in that court rendered against the plaintiff in error, reported in 58 Kas., 447. Under the guise of section 2, chapter 155, Laws of Kansas 1885, hereafter quoted, judgment was rendered against plaintiff in error for $225, as attorney's fees, because it was unsuccessful in its defense of an action brought in the District Court of Cloud County, Kansas, by defendants in error against plaintiff in error to recover damages arising out of the destruction of an elevator claimed to have been destroyed by fire set out in

the operation of the railroad. Plaintiff in error contended that the section of the statute in question was in contravention of the equality clause of the Fourteenth Amendment to the Federal Constitution, in that such an act of the legislature, when enforced, deprived it of its property "without due process of the law" and denied to it "the equal protection of the laws." This claim was denied by the Supreme Court of the State.

The undisputed facts found in the record in this case show that plaintiff in error was justified in defending, and that it was denied the right to make a meritorious defense upon equal terms with other persons in that state.

The case arose out of the burning of an elevator building at Miltonvale, which it was claimed by plaintiffs below was due to fire negligently permitted to escape from one of the locomotives of defendant (plaintiff in error). Defendant claimed and supported its contention by evidence that the fire originated from a furnace in the engine-room of the elevator, and that owing to distance and time and other circumstances it could not have been communicated to the outside of the building by sparks thrown from a passing locomotive. It denied that the fire originated from its locomotive; denied all negligence, and disputed the value of the property destroyed. Suit was brought to recover something like $4,000 and attorney's fees. The verdict was for $2,094, as the damages for the building, and $225 as attorney's fee, and judgment rendered accordingly. The building was situated upon the right of way of the Union Pacific Railroad Company, and about eighty-eight feet north from the track of the defendant. A freight train of defendant passed west along this track about 6 o'clock on April 17, 1893. Fire was first discovered breaking out from the

building more than half an hour afterwards—that is, between half-past six and seven o'clock. The jury found that the negligence consisted solely in working steam too hard and throwing fire from the engine. The engine itself and all appliances were in first-class order, but it appeared from some of the testimony that cinders were thrown from the smoke-stack to the office building. The fire broke out on that side of the building where the engine and boiler rooms of the elevator were, and there was a lot of trash which had not been cleaned up around the engine in the elevator, in which there was still fire. The evidence tending to show that the fire originated from the locomotive was wholly circumstantial, and if it had been communicated to the spout through which the cobs had been discharged, as was claimed by plaintiffs, it would certainly have manifested itself sooner.

In the opinion of the Supreme Court there is set out a portion of the language used by the trial court on the hearing of the motion for a new trial, and the opinion states that there are "other statements made by the judge, some of which are slightly stronger in opposition to the verdict than those quoted." While not very important, we take the liberty of setting out in parentheses some of "the other statements," as well as the language quoted in the opinion of the Supreme Court as used by the trial court:

"The Court: I will say this: that this evidence doesn't carry any conviction to my mind either way. You say it is quite evident the fire originated from the building itself, from the engine and boiler or machinery, while Mr. Sheafor says it is equally as clear that they had nothing to do with it; that the fire could not have originated in that manner. (Now, I am inclined to think there is a possibility either way.) * * * I think, and what I have thought about this case from the beginning is, that

there was no certainty as to who set the fire, and it is not clear to my mind yet, and you might offer this evidence twenty times, and I should never be satisfied as to the origin of that fire; whether it arose from the railroad, or whether it arose from the engine and boiler, and I don't see how any person can. (That is the way I consider this. I say there is a possibility that the road set the fire, and there is an equal possibility that the engine of the elevator set the fire, and if you tried this case a hundred times and over, with the same evidence, my mind will never be any better convinced that it is now.

"(Mr. Peck: Is there any evidence of that probability?

"(The Court: Yes; there is evidence. There is a *possibility* that the road set the fire; there is a *possibility* that the fire originated from the engine and boiler, and that is as far as this evidence shows, and it is not clear as to the origin.

"(Mr. Kenneth: As I understand the court, then, the most favorable light in which the evidence may be viewed by plaintiff, that it is evenly balanced as to the origin of the fire?

"(The Court: That is just about the way it strikes the court. You might say, possibly, that I don't remember all those witnesses that testified for the defendant, but I remember there was Head and Koster, and some of them that saw the fire in its earliest state, saw it in the engine room, and the evidence of that man who went around the south side, was that there was no fire except in the engine room.

"(Mr. Peck: The party who came to look after lumber saw no fire.

"(The Court: It is hard to weigh the probabilities minutely, but the most I am willing to say about it is, there is a possibility as to the origin of the fire; there is a possibility that the road set it afire, but I am not willing to say, and never will, if this verdict is set aside, and the case tried again, and you offer your evidence, as far as the court is concerned everything will be in the same condition.) I will say this, as I have said, if I had been on that jury, I should not have found that verdict, not that I would have been positive that the road didn't set it afire, but because

I could not have had evidence enough to satisfy my mind that the road did set it afire. * * * If the court should grant a new trial in every case where he would not have found the same verdict as the jury, why then I should grant a new trial in this case, because I would not have found that verdict; because I could not have found that the defendant set the fire, but then, if the court is to be the sole judge and arbitrator, what is the duty and object of the jury? I take it the jury were a fair, average jury, men of good judgment—just as good as the court, if not better, in matters of this kind—and just as honest and conscientious. * * * (So far as coinciding with the verdict, I do not; but I feel almost that I ought to have some respect for the jury, and if there is evidence upon which to base the verdict, and I take it there is sufficient, or else I ought to have sustained the demurrer. When the plaintiff rested, the demurrer was offered, and I overruled the demurrer, because I thought there was enough to go to the jury, and, as I say, I take it that when the defendant offered its testimony, the defendant rather strengthened its case and weakened that of plaintiff, but still it seemed to me the case should go to the jury—that there was evidence enough to take it there.) * * * (There is an equal possibility that the fire originated from some other cause as well as from the railroad engines.) It comes down to that, as you very properly say, that is, there are two possible causes, and a fair statement is that the probabilities are about equal; you claim the probabilities are that the road set the fire; they claim that the probabilities are that the engine set the fire. Now, the possibilities are equal, and the probabilities are not far apart. You each claim to suit your theory. That is just the condition of this case, and the case was submitted to a jury, and the jury found for the plaintiff and against the railroad. Now, the question is, ought the court to put itself and its judgment against that of the jury, and find the other way? (There are also other questions in the case, about the negligence; I believe the jury found that the negligence was in the working of the steam.

"(Mr. Kenneth: In the working of the steam?

"(The Court: Well, whenever it comes to a condition of affairs that an engine cannot work steam at a depot it would be a rather peculiar state of affairs. Possibly it is in the working of steam with that engine that they may have found negligence.

"(Mr. Kenneth: The engine, they say, is perfect.)

"The Court: Well, the case has been tried, and two theories have been submitted. I take it there has been some evidence in support of each theory, and possibly enough to justify a verdict on whichever theory the jury saw fit to find, and the object and purpose—the duty—of the jury being, as I understand it, to pass upon such questions, I will let the judgment stand, although to my mind the evidence is not convincing. (It was not certain there was negligence, and more especially that it was not certain as to the origin of that fire, and if you tried this case a thousand times, I never will be convinced that the engine set that fire unless there is more evidence offered than there has been in this case, which, I suppose, cannot be done. If you should try this case again, you would come to the same state of affairs—you would have just this same evidence. If the evidence is sufficient, the verdict ought to stand; if it is not sufficient, the plaintiff ought not to further pursue the road, and ought not to have judgment, and ought not to have a verdict, and I think the best way is to let the case go to the Supreme Court, and if the Supreme Court thinks there is evidence enough in this case to justify that verdict, they can let it stand on the judgment of the jury rather than on that of the court, and the motion is overruled.)"

The court instructed the jury, among other things:

"*If they (plaintiffs) are entitled to recover, they are also entitled to recover a reasonable attorney's fee for the conduct of this suit.*"

This was excepted to by defendant.

From the foregoing it will be seen that defendant was held liable, not because there was a *probability*, but simply because there was a *possibility* that the fire was set out from its locomotive, and that if so the negligence

consisted solely in working steam too hard, that is, putting on more steam to move the train than in the estimation of the jury seemed necessary.

We set out these facts at length simply to illustrate that the statute in question applies though there exists every reason and justification to defend, and that in cases of this nature there are usually and frequently involved the following disputed questions:

First. As to the origin of the fire which caused the damage, whether caused by the defendant or otherwise.

Second. The character of the act of the defendant claimed to have caused the damage, as to its being negligent or not.

Third. The extent or amount of damage suffered by plaintiff.

Upon any of these questions a defendant should be entitled to access to the courts and to be heard in its defense upon the same terms as every other person in the community, or at least as others in the same character of cases or actions.

The statute in controversy, chapter 155, Session Laws of Kansas 1885, approved March 6, 1885, reads as follows:

"An Act relating to the liability of railroads for damages by fire.

"Be it enacted by the Legislature of the State of Kansas:

"Section 1. That *in all actions against any railway company* organized or doing business in this state, *for damages by fire*, caused by the operating of said railroad, it shall be only necessary for the plaintiff in said action to establish the fact that said fire complained of was caused by the operating of said railroad, and the amount of his damages (which proof shall be *prima facie* evidence of

negligence on the part of said railroad): *Provided*, that in estimating the damages under this act, the contributory negligence of the plaintiff shall be taken into consideration.

"Sec. 2. *In all actions commenced under this act*, if the plaintiff shall recover, there *shall* be allowed him by the court a reasonable attorney's fee, which shall become a part of the judgment."

The first section imposes no absolute liability, but simply alters the rule of evidence or burden of proof as to negligence theretofore in force in that state. The second section imposes upon this class of defendants an attorney's fee in favor of plaintiff if successful. Under this act it is held that it includes fires set out by section men upon the railroad right of way for the purpose of clearing the same, where such fires are permitted, through the negligence of the section men, to escape and spread upon adjoining lands. (See *Mo. Pac. Ry. Co.* v. *Cady*, 44 Kas., 633.)

Attorney's fees must be demanded in the petition and the question as to amount submitted to the court or jury trying the case. This is one of the issuable facts in the case. (See *Fort Scott, Wichita & Western Ry. Co.* v. *Karracker*, 46 Kas., 511; *Fort Scott, Wichita & Western Ry. Co.* v. *Tubbs*, 47 Kas., 630.

POINTS.

The right of defense is as valuable and entitled to the same consideration, protection and facility, and should be as untrammeled as the right of action or the right to sue. The courts should be open to all upon the same terms, without discrimination. Justice is not administered, nor courts resorted to, as matter of grace, but as of right.

As the statute is construed by the Supreme Court of Kansas, in actions against a railroad company for damages caused by fire negligently permitted to escape from locomotives, or, while clearing off the right of way, from the premises of the railroad company, such railroad company is only given the right to defend against disputed questions which may necessarily and in good faith arise in such an action, at the peril and upon the condition of being compelled, if unsuccessful in such defense, through the whim or caprice of a jury, error of the court or unskillfulness of its attorney, or for any other reason, to pay the plaintiff an attorney's fee for prosecuting the very claim in dispute which must be awarded by the jury. If successful, it cannot recover for its attorney's fees.

The farmer who negligently permits fire to escape from his premises while clearing his stubble field, the owner of a steam-threshing machine or a traction engine while using the same and negligently permitting fire to escape therefrom, and every other person or corporation of every other class in the community who negligently, or

even recklessly, suffers fire to escape from his or its premises or appliances used in his or its business, destroying the property of others, has the free and unrestricted right to defend without being subjected to the unusual and extra ordinary burden of paying plaintiff an attorney's fee The wrong committed is no greater or more flagrant in the one case than in the other.

It is not conceived that a spark from a locomotive or fire escaping from burning grass upon the railroad right of way, in clearing the same, burns hotter or spreads farther than the farmer's or the mechanic's fire; neither can it be claimed that the agents or servants of railroad companies are more negligent in this respect than average individuals in the community; nor that railroad companies without reason refuse to pay just claims of this nature oftener than other persons.

It is safe to say that the legislature of Kansas would never have passed a law which would impose upon farmers or other persons generally in the community a liability for attorney's fees in actions brought to recover damages caused by negligently permitting fire to escape and destroy property of others

The law in question imposes its unjust and unfair burden upon only six persons (railroad companies) in the state—a hopeless minority—and, therefore, selected for such an unjust discrimination. Such a statute is partial, unequal and not "due process of law."

It is not important to consider whether the legislature of Kansas might have imposed an absolute liability upon railroad companies, as this has not been attempted, and such a law has not passed the challenge of the constitutional provisions of the state. Even in such case the

railroad company might rightfully dispute the question as to the origin of the fire and the extent of damages.

Neither is this analagous to a statute which provides that certain prescribed precautions (as fencing railroads) must be adopted in certain dangerous businesses, and imposes for failure to adopt the same a liability in double damages. Here, no precautions are prescribed by the legislature, and therefore no failure to comply with anything prescribed. Penalties can only be constitutionally imposed for violations of definite statutory requirements not dependent on the varying estimates or opinions of juries. (*L. & N. R. R. Co.* v. *Commonwealth*, 99 Ky., 132, and cases cited.) Again, where double damages are imposed, the claim cannot be satisfied without payment of the same, and the claimant is entitled to such damages either before or after the institution of the suit.

With reference to attorney's fees, where the right thereto depends solely upon the success of the plaintiff, the case is different. The claim may be satisfied before suit by paying the actual damages only. It cannot be regarded as a penalty for being negligent, for the right thereto does not attach or accrue if the damages demanded be paid. It only attaches as the result of litigating. It follows from an independent act of defendant not a part of but subsequent to the negligence which gives the right of action.

It follows clearly that they are simply imposed upon the defendant because it has refused to settle a disputed claim for damages usually at claimant's figures, but has asked the arbitrament of the court upon the controverted questions involved, and is unfortunately unsuccessful in wholly defeating plaintiff's claim frequently through prejudice of the jury.

The statute was adopted for the purpose of deterring this class of defendants from appealing to the courts and contesting such claims. Such attorney's fees are simply imposed because the defendant has insisted upon an appeal to the courts and has defended. It is inflicted as a punishment or penalty for refusing to pay a disputed claim without a resort to the courts.

If it be considered under a strained and unwarranted construction that these fees are awarded as damages, though not naturally or proximately growing out of the wrong or negligence, then the statute creates a different rule of liability for this small class than that affecting other persons in similar cases or under substantially similar circumstances.

It cannot be doubted for a moment but that, if this class of defendants were wholly denied the right to contest the question of liability in the courts, any judgment so rendered would be "without due process of law."

Hovey v. *Elliott*, 167 U. S., 409.

Therefore, where such defendants are only permitted to defend cases of this nature upon the penalty, if unsuccessful, of paying an attorney's fee to the plaintiff for the prosecution thereof, this is a burden upon the right of defense and is *pro tanto* "without due process of law." Where no such burden is placed upon other persons in the community in the same character of cases, viz., actions for damages caused by permitting fire to negligently escape and destroy property, or indeed where such a burden is not placed upon other persons when unsuccessful in defending suits, and where the plaintiff has no such burden imposed upon him when unsuccessful in such cases—this denies to such defendants, upon whom such burden is imposed, "the

equal protection of the laws," that is, the protection of equal laws—the protection of the general rules which govern other persons in the state—the protection of those general laws of the state which protect all other persons in the community in the assertion of their rights, whether of action or defense, and in the resort to the courts for judgment thereon, without this burden, whether they be successful or unsuccessful.

The provision of the Kansas law in respect to attorney's fees, therefore, violates that part of the first section of the Fourteenth Amendment reading: "Nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Under a judgment rendered in pursuance of and in carrying out such a statute, the railroad company will be deprived of its property by an act of the state contrary to the above prohibition.

As will be shown hereafter, this case falls within the principle announced in *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S., 150, as well as the authorities cited in our argument, but which cannot be conveniently grouped under the foregoing points.

ARGUMENT.

THE OBJECT OF THE STATUTE IS TO IMPOSE ATTORNEY'S FEES UPON RAILROAD COMPANIES AS A PENALTY FOR RESISTING CLAIMS OF THIS NATURE AND APPEALING TO THE COURTS FOR JUDGMENT.

In any event, it imposes a penalty upon one class of persons alone which is not imposed upon the plaintiff nor upon other defendants in similar actions or classes of cases.

Note the first section reads:

"In *all actions against railroad companies* * * * for damages by fire caused by the operating of said railroad," etc.;

and this, by judicial construction, applies to fires negligently permitted to escape while the right of way is being cleared through the use of fire, in the same manner as the farmer in clearing his field.

Section 2: That

"in all *actions* commenced under this act" (which are actions against railroad companies only), "if the plaintiff shall recover, there shall be allowed him by the court a reasonable attorney's fee."

What is the object, what the result, of the statute? Simply to give a plaintiff an advantage in certain litigation over a certain class of persons who may be defendants. No precautions are prescribed by the statute which the railroad companies are to take. No previous presentation of the claim or demand for payment, or proof, is made necessary, but forthwith, at the instance of any lawyer hungry for a fee, the suit may be instituted, and

the railroad company may be mulcted in the penalty of an attorney's fee. Such a statute can only lead to oppression and injustice; it places too formidable a weapon in the hands of such claimants against this class of defendants. The railroad company may yield to an unjust and exorbitant demand of the claimant and escape a penalty which might be inflicted if it demanded that such controversy be settled by the court, the same as every other person in the community would have the right to do. The attorney's fee cannot be regarded as part of the damages suffered by the claimant, because it does not naturally or proximately follow from the original cause of the action, the negligence or wrong, if any. The right to such fee does not attach or accrue unless the defendant seeks to assert its privilege of appealing to the courts to settle the questions in dispute, and does not attach unless the defendant be rightfully or wrongfully unsuccessful in its defense. It, therefore, is solely the result of an independent subsequent act of the defendant, viz, a refusal to pay a claim for which it, after investigation, may deem itself not to be liable.

The Kansas courts, in the decisions heretofore referred to, have adopted an anomalous position. Instead of allowing the court, after return of the verdict, to determine what the attorney's fee should be, in accordance with the services actually rendered, expert testimony is introduced to ascertain what it is reasonably worth to prosecute such a suit, and the jury determine what it ought to be before the services are completed. The award of the jury may be in excess of what the plaintiff actually pays his attorney. When they find that a railroad company is to be mulcted with these fees they are

not likely to weigh the matter in golden scales. They are, therefore, awarded to the plaintiff solely on account of and as the result of litigating, and not as a result of the original wrong, nor as damages caused by the negligent act.

The only rational view, therefore, which can be taken of such a statute was the view taken by the Supreme Court of Michigan in the case of *Wilder* v. *Railroad Company*, 70 Mich., 382, and the other authorities cited by us hereafter on the question of attorney's fees—that it imposes a penalty for a resort to the courts by such defendants in such cases which is not placed upon the plaintiff or upon other classes of defendants in similar actions, and is, therefore, unequal and unjust in its operation—denying freedom of access to the courts and the right to be heard therein on equal terms with others. The plain object was to deter the railroad companies from contesting such claims. This being the apparent purpose, object and effect of the law, it is not necessary or proper by interpolation to discover or make out some hidden purpose. The court forgets its function when, solely for the purpose of sustaining a law, it attributes thereto a purpose and object opposed to that which is the plain result or effect of such statute.

It has always been held that in actions even for malicious wrongs attorney's fees for prosecuting the very action cannot be awarded by the jury, because they are not the direct or natural consequence of the wrong.

Stewart v. *Sonneborn*, 98 U. S., 187, 197.
Good v. *Mylin*, 8 Pa. St., 51.
Oelrichs v. *Spain*, 15 Wall., 230 and 231.
Stopp v. *Smith*, 71 Pa. St., 285.

Alexander v. *Herr*, 11 Pa. St., 537.
Barnard v. *Poor*, 21 Pick., 378, 381 and 382.

In *Hicks* v. *Foster*, 13 Barb., 663, which was an action for slander, it was held that the jury had no right to take into consideration the expenses (counsel fees) to which the plaintiff had been put by being compelled to come into court to vindicate her character.

On pages 368 and 369 it is said:

"If the plaintiff is to recover damages for his counsel fees and extra expenses when he succeeds, to make the rule reciprocal he ought to pay the defendant's counsel fees and extra expenses when he fails in his suit. * * *

"Let us recur to the rule that the damages must be the natural legal result of the injury complained of; that they must be proximate, not remote or contingent, and it seems to me that a little reflection will satisfy us that the expenses incident to a trial are not a proper item for the consideration of a jury, in ascertaining the damages. They are too remote and contingent. The plaintiff sustained the injury before the action was commenced, and was entitled to her full measure of damages; not having, however, employed counsel or been put to any expenses, clearly she could not have sustained expenses therein as an item."

To the same effect is *Day* v. *Woodworth*, 13 How., 363, in which it is stated that, by the common law, no costs were awarded to either party *eo nomine;* that if the plaintiff failed to recover, he was amerced to the king *pro falso clamore.* If he recovered judgment, the defendant was *in misericordia* for his unjust detention of the plaintiff's debt, and was not, therefore, punished with the *expensa litis* under that title. Under an early statute costs were awarded, but under this statute every common law court had an established system of costs allowed to the success-

ful party by way of amends for his expense and trouble in prosecuting his suit; and it is further said in that case that where a rule of law should exist allowing a jury to find costs *de incremento*, in the shape of counsel fees, they should be permitted to do the same for the defendant where he succeeds in his defense; otherwise, the parties are not suffered to contend in an equal field.

So in *Oelrichs* v. *Spain*, on page 230, it is said, in determining whether counsel fees should be allowed where a temporary injunction which had been granted was set aside:

"The plaintiff is no more entitled to them (counsel fees) if he succeeds than is the defendant if the plaintiff be defeated. Why should a distinction be made between them?"

In *Good* v. *Mylin*, 8 Pa. St., 51, overruling previous cases, it was held that attorney's fees were not recoverable even in an action for tort. GIBSON, C. J., says that while special damages may be recovered in an action for tort yet the resulting injury must be the natural and legal consequence of the tort, and not remote. He says there is no precedent for the allowance of such fees in the English, and scarcely one in the American books from the Norman conquest to that day, and that the fact is so is conclusive evidence that there is no such principle in the law. No lawsuit is prosecuted without trouble and expense, and were compensation for these recoverable, as an original ground of action by anticipation,

"the claim would be a standing dish, and we should have a direct precedent for it in every trial. * * * Such a principle of compensation is contrary to the genius of the common law, which does not give even costs, and the statute of Gloucester does not embrace it. Indeed, were such compensation allowed, it would only be as costs; for it would be infinitely more congruous

and convenient to have it taxed by the prothonotary, on proof of particulars, than to have it assessed by the jury, without any proof at all."

What will be the result of a suit in a majority of cases is a matter of doubt. Because facts may be disputed and the law is not always certain, everyone is given the right to resort to the courts to have such disputes determined in a peaceable manner. It is a fundamental right which cannot be denied to anyone, but should be accorded to all on equal terms according to the spirit of the common law.

A statute which attempts to impose attorney's fees upon a single class of defendants for prosecuting the very action is against reason, right, justice and equality.

The constitutionality of the law is determined by its effect, regardless of the interpretation placed thereon by the state court as to its meaning or purpose.

It is well settled that in whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect.

See *Henderson et al.* v. *Mayor of New York et al.*, 92 U. S., 259.

On page 268 it is said:

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore, and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the *Passenger cases.*"

The same rule was followed in *Yick Wo* v. *Hopkins*, 118 U. S., 356. On page 366, after referring to the ruling of the Supreme Court of the state, it is said :

"That, however, does not preclude this court from putting upon the ordinances of the supervisors of the County and City of San Francisco an independent construction ; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge."

Therefore, this court must regard the statute as denying free access to the courts to these defendants on equal terms with others.

Should, however, we adopt a strained and unreasonable construction, not apparent upon the face of the statute nor from the manifest purpose and effect thereof, and say that this is imposed as a penalty for negligently permitting fire to escape and damage the property of another, then this statute imposes a penalty upon railroad companies alone for simple negligence, where all other persons, guilty of the same kind of negligence causing similar damages or where guilty of negligence in a greater degree, or even of recklessness, have no such penalty imposed upon them. But as the supposed penalty does not attach unless the suit be brought against one of this class of defendants, and the defense be unsuccessful, the only rational conclusion which follows is that the penalty is imposed, not as a result of the negligent setting out of the fire, but as a result of litigating, which is something wholly independent of the original wrong. It is difficult to understand the position of the Kansas Supreme Court, that " this is *somewhat* in the nature of a police regulation,

designed to enforce care on the part of railroad companies," when it is in effect solely a regulation in regard to proceedings in court. The first section of the statute regulates the practice, that is, prescribes the rule of evidence applicable in such actions against this class alone. So the second section referring to the same actions against the same class regulates the action of the court by compelling it, if plaintiff succeeds, to impose a penalty upon the defendant, because it defended against such an action unsuccessfully. It refers solely to such actions and affects nothing but the action. There is no regulation prescribed in the statute as to the operation of trains or the use of precautions, and it is inconceivable how the imposition of attorney's fees at the end of a lawsuit was designed or even thought by the legislature as a necessary provision to enforce care on the part of the railroad companies in operating trains or clearing the right of way. A penalty can only be imposed for failure to comply with a prescribed regulation. A penalty is not a regulation but only the punishment for a disregard of a regulation. The effect should not be confounded with the cause. The wrong has been committed and may be satisfied by the payment of damages and the so-called penalty avoided by keeping out of court. The only care which such a provision would be designed to enforce on the part of railroad companies would be the care to avoid courts or to be more successful in defending.

As well might they legislate that in such cases the plaintiff if unsuccessful, should not be obliged to pay costs, or the defendant, if unsuccessful, should be mulcted in a penalty of a thousand dollars; for, if the legislature has the power, there can be no limit upon the amount of the penalty it may fix.

The legislature has not the constitutional power to fix a rule of damages for one person or class of persons, and an entirely different rule for all others under like circumstances or in like actions. These cases are simply to recover damages caused by fire negligently permitted to escape. Railroad companies, under the laws of Kansas, are only required to exercise reasonable care in this respect, which is the same rule applicable to others. No greater duty is imposed upon them. "Like circumstances" are the like salient facts affecting the question of liability of one person to another for an alleged wrong. In these cases negligently permitting fire to escape and destroy property is equally a wrong whether caused by any person as well as a railroad company, but if the railroad company is guilty and resists the claim it is mulcted in attorney's fees if unsuccessful, while free liberty of resistance to such claims is accorded to others without the penalty. Why should claimants in cases against railroad companies alone for damages caused by mere negligence be put in a more favorable position than claimants against other persons for exactly the same kind of a wrong causing the same kind of damages; or why should railroad companies alone have imposed upon them a different rule of liability and different penalties than are imposed upon other classes of persons for similar wrongs? It has been the invariable holding that it is unjust to give the plaintiff an advantage in a lawsuit which is not given to the defendant.

Eqality Clause of the Fourteenth Amendment.

That part of the Fourteenth Amendment relied upon has been frequently invoked, and great difficulty has been experienced in determining the exact meaning intended

of "due process of law" when used as a constitutional limitation. The difficulty, no doubt, arises from the use of a phrase as a constitutional limitation upon the exercise of legislative power, which phrase, when first used, could not be considered owing to the form of government then existing as effective in forbidding subsequent legislation, though in conflict with the guarantees of the Great Charter where its equivalent was used. The phrase "due process of law," in its narrowest sense might mean proper or lawful process or procedure of law which would guarantee the right to a judicial hearing and determination in accordance with established rules and would involve all the elements of a lawful hearing and determination. It has, however, never been wholly confined to the narrow sense of a right to a hearing before judgment, nor limited to mere modes of procedure. While it has generally included the right to a hearing before the rendition of an absolute and final judgment, it has also guaranteed or attempted to guarantee that life, liberty and property should not be taken even by judgment or sentence rendered in accordance with a statute except in pursuance of fundamental principles of right and justice. When used in a constitutional provision, those adopting it attempted to preserve for their protection some of those fundamental principles of right, justice and uniformity recognized and cherished by the common law.

One of these was a right to resort to the courts, which right is of such a high nature that it cannot be surrendered.

In *Ins. Co.* v. *Morse*, 20 Wall., 451, it was said

"every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom or his substantial rights."

The part of the first section of the fourteenth amendment quoted is a limitation upon every agency of the state governments and upon every power which may be exercised by them—a limitation upon the state itself—a limitation upon the legislative power as well as upon the executive and judicial or any combination thereof—a limitation upon the political power of the people of a state. No *state* shall deprive any person of life, liberty or property without due process of law, &c.

It therefore also means that no statutory law passed by the legislature of the state shall be effective or enforced by the courts to deprive any person of life, liberty or property without due process of law. The word "law," used in the constitution, has a higher and broader signification than a mere act of the legislature or a statutory law. Every statute, though regarded as a law, which is contrary to the spirit of the constitution, is not law.

The meaning of "due process of law," as shown hereafter, is one which has been frequently stated by courts, and this meaning is intensified and made apparent when coupled with the following phrase, prohibiting the state in the exercise of any of its powers from denying to any person within its jurisdiction the equal protection of the laws. The latter phrase, being also a limitation upon the legislative power, is equivalent to saying that no legislative act or statute shall deny to any person within the jurisdiction of the state the equal protection of "the *laws*," used in a collective sense. The prohibition is upon the enacting of a law which shall deny to any person the equal protection enjoyed by other persons in the community of the general laws. Every statute which denies to any person or class of persons, subject to the jurisdiction of the state, the same protection under similar

facts or circumstances in the enjoyment of rights or defense of person or property as is accorded to others under the general laws, is unequal in its operation and denies the protection enjoyed by others. So it was well said by Mr. Justice MATTHEWS in his masterly opinion upon this provision, delivered in *Yick Wo* v. *Hopkins*, 118 U. S., on page 369:

"These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality; and *the equal protection of the laws is a pledge of the protection of equal laws.*"

Therefore, the special or partial law, when repugnant to the general laws in respect to the protection of the person or property, necessarily falls under the ban of this provision and is void, for by this provision the general laws in these respects are made superior.

The provision in question is comparatively modern in the history of government. It is a most enlightened, benign and just limitation upon the powers of agencies of government. It was intended to guarantee to the unprotected minority that measure of justice and equality before the laws and in the courts, which lies at the basis of a democratic form of government, and so prominently set forth in the Declaration of Independence, but which, owing to the lack of some adequate restriction or limitation and to the placing of arbitrary power in the hands of a majority, was seldom, if ever, realized.

To ascertain the spirit of this provision, an examination of the historical standpoint may, while somewhat tedious, be nevertheless of some assistance, and a reference to familiar history may be pardonable.

THE PHRASE "DUE PROCESS OF LAW," AS ORIGINALLY USED, WAS EQUIVALENT TO "LAW OF THE LAND," AS USED IN MAGNA CHARTA, INTENDED TO SECURE AND GUARANTEE THOSE FUNDAMENTAL RIGHTS FOR THE PROTECTION OF LIFE, LIBERTY AND PROPERTY, ACCORDING TO THE GENIUS OR SPIRIT OF THE COMMON LAW.

According to all the authorities, the phrase "due process of law" was first used by Lord Coke, the great commentator on Magna Charta and champion of the common law, as equivalent to "law of the land," or "due course of the common law."

See 2 Story on the Constitution (5th Ed.), Par. 1789.

The famous twenty-ninth section of the great charter, so familiar to all, reads:

"*Nullus liber homo capiatur vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur. Nec super eum ibimus, nec super eum mittemus nisi per legale judicium parium suorum vel, per legem terrae.*"

It is followed by the significant provision:

"*Nulli vendemus, nulli negabimus, aut differemus rectum aut justitiam.*"

This may be said to have established the principle of a right to resort to the courts on equal terms.

The phrase "*lex terrae*" had a peculiar meaning. During the early middle ages, when the Goths, Huns and other barbarous tribes were sweeping over the provinces of Europe, migrating from place to place and obliterating vestiges of Roman civilization, the idea of a law peculiar to a territory, applicable generally within that territory, or a *lex terrae*, was unformed. There was a law for

the conqueror and a law for the conquered. Each individual carried with him the law of his tribe or nation, and that law he invoked for protection of rights or defense against charges. Up to the time of the Norman conquest in England there was a law of the Mercians, another of the West Saxons and another of the Danes; shortly after the conquest, a law for the English and a law for the Normans. The effect of the conquest, subjecting England to the rule of the Norman kings, was to convert the law of England into a *lex terrae*, a true local law, a law of the land. It took almost a century to accomplish this result, which was said to be due to feudal principles. England was one great fief in the hands of the king, and it was to have but one law. Henry II. did much to make the law uniform in its operation, and Glanville, writing in that reign, can speak of the "law and custom of the realm." About this time a celebrated expression makes its appearance in England. Men begin to speak of the "common law."

(See Law and Politics of the Middle Ages, page 35, by Edward Jenks, of the University of Oxford.)

King John and his royal officials, in carrying on his expensive war in France, as the barons refused to serve beyond the realm, made many arbitrary and illegal seizures, exactions and forfeitures and claimed aids contrary to the laws and customs which governed the feudal tenures, and generally disregarded the rights and privileges which were deemed protected by the ancient laws and customs, and which Henry I., in his charter, had promised to restore, that is, order and the "law of Edward"—the old constitution of the realm. Here the laws of the conquered, or rather its spirit, ultimately triumphed over the laws of the conqueror. During

John's absence in France Stephen Langton, archbishop of Canterbury, primate of England and champion of the old English customs and law, at a meeting of the barons, produced the charter of Henry I., but which shortly before that time and before John's departure had been brought to light by the justiciar, Geoffrey Fitz-Peter. To secure a confirmation of this charter, the barons and freemen, making common cause, met John in 1215, after his defeat at Bouvines in France, and wrung from him the Great Charter, which was intended simply as a concession from the king and a confirmation of old rights, of the old laws and customs which had been secured in the concession of Henry I., but not so definitely. This charter contained little that was new. It was restorative.

Pollock & Maitland, History of English Law, page 151.

So Lord COKE, in his Institutes (Bk. I, Ch. II, 81 a) says:

"This statute (*Magna Charta*) is but a confirmation or restitution of the common law, as in the statute called Confirmatio Chartarum, *anno* 25, E. I., it appeareth by the opinion of all the justices, and in 5 H. 3, tit. Mord., 53. Magna Charta is there vouched; for there it appeareth that King John had granted the like charter of renovation of the ancient laws."

He also says in the same work (Bk. I, Ch. II., 115 b):

"The law of England is divided (as hath been said before) into three parts: 1, the common law, which is the most general and ancient law of the realm, of part whereof Littleton wrote; 2, statutes or acts of parliment; and, 3, particular customs (whereof Littleton also maketh some mention). I say particular, for if it be the general custom of the realm it is part of the common law. * * * The common law appeareth in the statute of Magna Charta and other ancient statutes (which for the

most part are affirmations of the common law), in the original writs, in judicial records, and in our books of terms and years."

In the some work, I. Institutes, 11 b. (Lib. 1, Cap. 1, Sect. 3), in commenting on Littleton, he says:

" ' *En la ley.*' There be divers lawes within the realme of England. As first, (a) *Lex coronae*, the law of the crowne.

2. (b) *Lex et consuetudo parliamenti. Ista lex est ab omnibus quaerenda, a multis ignorata, a paucis cognita.*

3. (c) *Lex naturae*, the law of nature.

4. (d) *Communis lex Angliae*, the *common law* of England, sometimes called *lex terrae*, intended by our author, in this and the like places.

5. (e) Statute law. Laws established by authority of parliament." etc.

Here we see that *lex terrae* is always used in the same sense, meaning the " *common law*," the ancient laws and customs, founded upon the reason and necessities of the particular age and changing with such reason and necessities—capable of growth and expansion, and drawing upon other systems of jurisprudence for enlightenment—a law which in the time of Henry II. was designated as the " law and custom of the realm," generally spoken of as the " common law"—a law common to the whole country, so designated as *common* because uniform in its operation, equally applicable to and intended for all, and under which the same liability would be imposed generally upon every one in the community under substantially similar facts and circumstances. It involved something more than mere procedure or the right to be heard, though this was necessarily included. It embraced the law or rule by which the very right was to be determined.

This meaning is borne out by the preceding words, "*judicium parium*," by some erroneously supposed to refer to trial by jury, but which at that time simply meant one method of determining and administering the law, particularly that applicable to the feif when there was no record or register in the Court Baron of the law appertaining thereto. "*Judicium*" was never used as applicable to the verdict of a jury. In case of dispute, as the law of the feif was distinct from the law of the land, the parties consulted the register of the court, and where this was silent, the pares, compeers or freemen of the same feif determined and declared the law or rule of the feif. This was judgment by peers.

See,

Jenks' Law and Politics of the Middle Ages, pp. 23, 24, and pp. 125–128.

Forsyth, Trial by Jury, 91-95.

Reeves' Hist. of Eng. Law (Am. Ed.), Vol. 2, p. 41; note (b) by Finlason.

When they demanded to be tried by the law of the land they meant a law well known; they did not mean such law as might be declared in subsequent legislation. The idea of legislation was then crude. The formal edicts of the king, usually called assizes, were temporary in their nature, always initiated by the king, requiring only the consent of the greater barons where it affected them, as they held by feudal tenure. It was usually in the form of assizes, declaring new methods of judicial procedure in the King's Courts, and new regulations for the enforcement of royal justice.

Stubbs' Const. Hist. of Eng., Chap. 13, Sec. 160 page 573.

1 Reeves' Hist. English Law (Finlason), pp. 478, 479.

It was in force as long as the king pleased, and might be suspended at his pleasure. It was liable to be set aside by the judges where they found it impossible to administer it fairly.

Stubbs' Const. Hist. of Eng., Chap. 13, Sec. 160, pp. 574, 575.

Jenks' Law and Politics of the Middle Ages, pp. 16-22.

The lawyers of Henry II. claimed for him the right to make laws or edicts, such as they were, and even some of the succeeding kings made occasional ordinances.

Early statutes are said to be in confirmation or aid of the common law. Early legislation took the form of petitions from the great council to the king, usually asking affirmation or confirmation of what was claimed to be the common law, and assented to by the king on condition of receiving aid or for the right to tax.

For some time the Great Charter was looked upon in a crude way as a limitation upon all sovereign power, including the law-making power, and in an early statute the attempt to so provide was made.

In 1 Coke's Institutes, 81 b (Lib. 2, Cap. 4, Sec. 108), it is said:

"This statute of Magna Charta hath been confirmed above thirty times, and commanded to be put in execution. By the statute of 25 E. 1, Cap. 2, judgments given against any points of the charters of Magna Charta, or Charta de Foresta, are adjudged void. And by the statute of 42 E. 3, C. 1. if any statute be made against either of these charters it shall be void."

See, also, quotation from the Mirror, in a note on page 40, Reeves' History of English Law (American Edition by Finlason), where it was said that subsequent statutes

repugnant to provisions of the Great Charter would not be effective. This was Coke's view when chief justice, as declared in Dr. Bonham's case (8 Co., 118)—that the common law doth control acts of Parliament and adjudges them void when against common right and reason. As is well known, a similar idea was entertained by Lord Chief Justice Hobart in *Day* v. *Savage* (Hob., 87), and by Lord Chief Justice Holt in *City of London* v. *Wood* (12 Mod., 687).

There was, however, no power lodged anywhere to preserve its force and effect. The sovereign powers which concurred in making the charter might modify or destroy its effect.

A different result necessarily follows, however, where the guarantee is contained in a constitution, with a power or agency created to enforce and preserve it.

"Due Process of Law," as Used in Early Constitutions, Forbids Partial, Unequal and Unjustly Discriminating Legislation, as Well as That Which Denies a Hearing.

The phrase was used at an early day in the constitutions of some of the states and also in the fifth amendment to the Federal constitution. It is used interchangeably with the phrase "law of the land." It will be remembered that the lawyers who had a hand in forming the early constitutional provisions were deeply versed in the writings and thoroughly saturated with the ideas of Lord Coke. They had witnessed, if they had not participated in, the rebellion of the colonies against unjust and unequal parliamentary legislation. They were champions of the common law, of its genius, its spirit, and of the

great principles which it embodied. They recognized in it a uniformity of operation and a lack of invidious and unreasonable discriminations, also the right to resort to and be heard in the courts on equal terms, since it was settled that justice and right were not to be sold nor denied to anyone.

Great opposition had been made to the proposed Federal Constitution because it contained no bill of rights. It was finally adopted in the expectation that such a bill would be secured in the way of amendments. So, in 1788, a number of amendments were proposed, notably by the convention of Virginia, that of New York, and that of North Carolina, in which there will be observed great similarity. The first ten amendments were suggested among those proposed by these three states.

Virginia, among other things, proposed:

"That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, among which are the enjoyment of life and liberty, with the means or acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety. * * * That government ought to be instituted for the *common* benefit, protection and security of the people. * * * That no freeman ought to be taken, imprisoned or disseized of his freehold, liberties, privileges or franchises, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but *by the law of the land.* * * * That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments or regulations contravening these rights are oppressive and unjust."

North Carolina proposed the same in identical language.

New York proposed, among other things, similar to the above, the following:

"That the enjoyment of life, liberty and the pursuit of happiness are essential rights which every government ought to respect and preserve. * * * That no person ought to be taken, imprisoned or disseized of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty or property, but *by due process of law*," etc.

Virginia and North Carolina used the phrase "law of the land," while New York used its equivalent, "due process of law."

With an aptitude for terseness the First Congress substantially embodied these provisions in a few words by providing that no person should "be deprived of life, liberty or property without due process of law."

The explanation (of the phrase) most frequently quoted is that of Mr. Webster in his famous argument in the Dartmouth College case, wherein, however, he was only called upon to rely upon a very narrow construction. The legislative act of New Hampshire, the validity of which he was assailing, attempted to divest trustees of Dartmouth College alone of certain rights vested in them by the charter, and to have such rights transferred to officers appointed by the state; yet, in referring to the text in Coke's Institutes so often cited, Mr. Webster said:

"By the 'law of the land' is most clearly intended *the general law*, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is *that every citizen should hold his life, liberty and property and immunities under the protection of the general rules which govern society.* Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

Here it is defined as meaning the general law, and property is to be held under the general rules applicable thereto which govern the people. It can make practically but little difference from the standpoint of justice or reason whether a law be aimed at one particular individual or one particular corporation, or, by a narrow classification, aimed at a few individuals or a few corporations. When a law is to be executed through the instrumentality of the court, it will be enforced against a single individual or corporation. Where the subject-matter is one upon which general legislation, applicable to all in the community under the same circumstances, may be adopted, no reason or justice can be found for the passage or enforcement of a law partial in its operation. Such a law is not the general law, and under it the particular class of individuals affected do not hold their property under the general rules which govern the rest of society.

In 1819 Mr. Justice JOHNSON, in *Bank of Columbia* v. *Okely*, 4 Wheat., on page 244, referring to a similar clause found in the constitution of Maryland, used the following familiar expressions:

"As to the words from *Magna Charta* incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

It may be said that this is, perhaps, too general and does not afford a very clear guide, but it does show an understanding that all statutes which affect private rights are prohibited if contrary to established principles of justice, and they must, therefore, not be partial, arbitrary or unreasonably discriminating.

In early cases in Tennessee will be found an excellent exposition of the subject in unequivocal language, particularly that of Judge CATRON, afterwards an honored member of this court. His expressions are so fair, just and reasonable that they have frequently been quoted—always with approval and respect.

In 1829, in *Vanzant* v. *Waddel*, 2 Yerger, 260, it is laid down that a partial law, tending directly or indirectly to deprive persons of vested rights, or to the equal benefits of the general and public laws of the land, is unconstitutional and void. On page 269 Judge PECK said:

"A law which is partial in its operation, intended to affect particular individuals alone, or to deprive them of the benefit of the general laws, is unwarranted by the constitution and is void."

Judge CATRON, in the same case, said, on pages 270 and 271:

"The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or 'LAND,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another. The idea of a people, through their representatives, making laws whereby are swept away the life, liberty and property of *one* or a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of *Magna Charta* in England, securing the subject against odious exceptions, which is and for centuries has been the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a funda-

mental rule for the protection of the citizen against legislative usurpation, was the reason of its adoption as part of our constituton. See 2 Inst., 46, and the Declaration of American Independence."

In 1831, in *Wally's Heirs* v. *Nancy Kennedy*, 2 Yerger, 554, it was held that the act of 1827 of that state, authorizing the court to dismiss Indian reservation cases where prosecuted for the use of another, was a partial law intended to operate upon a few individuals, and was unconstitutional and void; that by the clause "law of the land" in the state constitution was meant a general public law, equally binding upon every member of the community. Judge CATRON said, on pages 555 and 556:

"Does that part of the act of 1827 which declares that the suit shall be barred, if the defendant prove it was prosecuted in trust for another, violate the constitution? By this it is declared that no free man shall be disseised of his freehold, or deprived of his property but by the judgment of his peers or *the law of the land*. What is 'the law of the land'? This court on two occasions, and upon the most mature consideration, has declared the clause, '*law of the land*' means a *general public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land, under similar circumstances;* and every partial, or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community, and those who made the law, by another; whereas a like general law affecting the whole community equally could not have been passed. (*Vanzant* v. *Waddel.*) For the most lucid and conclusive exposition of this clause of the constitution within the knowledge of the writer, he refers to the opinions of Judges Green, Kennedy and Peck, in the cause of the *Bank* v. *Cooper's securities*, at Nashville in 1831."

He further said, on page 556:

"The act was intended to drive from the courts of justice a few odious individuals, who it was supposed had speculated upon the ignorance and necessities of the Indian reservees, and fraudulently obtained their claims for trifling considerations, and were corruptly obtaining evidence to establish rights to reserves, where the Indians in fact never had any, to the prejudice of the purchasers from the state. If the supposed facts did exist there was good cause for public indignation, but none for a violation of the constitution by the passage of a law affecting the rights of a few individuals, but by which the great body of the people, or the legislators themselves, were unwilling to be bound. The part of the constitution referred to was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who from the nature of our government exercise the legislative power. Any other construction of the constitution would set up the majority in the government as a many-headed tyrant with capacity and power to oppress the minority at pleasure, by odious laws binding on the latter. The part of the act of 1827 above referred to is unconstitutional and void."

In 1831, in *State Bank* v. *Cooper et al.*, 2 Yerger, 599 (appendix), it was held that an act of the legislature of 1829, creating a special court for the determination of suits commenced by the Bank of the State of Tennessee against her officers and other defaulters to said institution, was unconstitutional, partial in its operation and not a law of the land.

On page 603 it is said:

"Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. The common law, says Lord Coke (8 Co., 118 a) adjudgeth a statute so far void."

On page 605, Judge Catron's definition of "law of the land" is referred to with approval, and the following language, well worthy of careful consideration, is then used:

"By '*law of the land*' is meant a general and public law, operating equally on every individual in the community. Such is the opinion of Judge Catron, in the case before referred to, and such was the opinion of Lord Coke upon the construction of *magna charta*. In his commentary on this instrument (2 Institute, 51), he says, that the terms '*law of the land*' *were used that the law might extend to all.* He informs us, that parliament, by an act in the 11th year of Henry VII., violated the principles of the great charter in this particular; and that, under the authority of this act, Empson and Dudley committed horrible oppressions and exactions, to the undoing of many people. But that in the first year of Henry VIII., this act was repealed on the avowed ground that it was a violation of the charter. 'And the ill success hereof (he adds) and the fearful end of these two oppressors, should deter others from committing the like, and should admonish parliaments, that instead of the ordinary and precious trial *per legem terræ*, they bring not in absolute and *partial* trials by discretion.' * * * This provision was introduced to secure the citizens against the abuse of power by the government. Of what benefit is it, if it impose no restraint upon legislation? Was there not as just ground to apprehend danger from the legislature as from any other quarter? *Legislation is always exercised by the majority. Majorities have nothing to fear; for the power is in their hands. They need no written constitution, defining and circumscribing the powers of the government. Constitutions are only intended to secure the rights of the minority. They are in danger. The power is against them; and the selfish passions often lead us to forget the right. Does it not seem conclusive then that this provision was intended to restrain the legislature from enacting any law affecting injuriously the rights of any citizen, unless at the same time the rights of all others in similar circumstances were equally affected by it.* If the law be general in its operation, affecting all alike, the minority are safe, because the majority, who make the law, are operated on by it equally with the others. Here is the importance of the provision, and the great security it affords."

Judge KENNEDY, in the same case, said (pages 620 and 621):

"For the purpose of ascertaining the importance of these words (law of the land) it is unnecessary to refer to their origin. The history of Magna Charta is identified with the law. The adjudications upon that instrument before our revolution settled the meaning and signification of this expression In the second part of Coke's Institutes, page 51, after showing various objections to the employment of other words in connection with these, which might give them a partial operation, the author says, '*but that the law might extend to all, it is said, per legem terrae, by the law of the land.*' Does this statute apply to *all* the citizens of the state? Does it apply to *all* the debtor class of society? Or to *all* those who are indebted to the bank? It does not. It is intended to affect only a few of those who are indebted to that institution. It cannot, therefore, with propriety, be called *legem terrae*, the law of the land. Other authorities on this point might be cited, but the universal admission of the accuracy of Coke in such learning makes it unnecessary. If it were necessary, the opinion of Judge Catron in the case of *Vanzant* v. *Waddel*, in manuscript, could be produced."

In 1833, in *Hoke* v. *Henderson*, 4 Dever. (N. C.), on page 15, Chief Justice RUFFIN said:

"These terms 'law of the land' do not mean merely an act of the General Assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be 'taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed, and be deprived of his property, his liberty and his life,' without crime? Yet all this he may suffer if an act of Assembly simply denouncing those penalties on particular persons, or *a particular class of persons*, be in itself a law of the land within the sense of the constitution; *for what is in that sense the law of the land must be duly observed by all, and upheld and enforced by the courts.* In reference to the infliction of punishment and divesting of the rights

of property, it has been repeatedly held in this state, and, it is believed, in every other of the Union, that there are limitations upon the legislative power, notwithstanding those words, and that the clause itself means that such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land' for those purposes. Although in some instances the principle may have been misapplied, yet it seems, in every case in which it hath come into discussion, to be admitted to be a sound one, and the true import of the constitution. It was early asserted in an anonymous case in 1 Hay. Rep., 29. It was acted on again in Doe on Dem., *Bayard* v. *Singleton* (Martin's cases, 48) in 1787, in which it was held that the act for conferring titles derived by purchase from the commissioners of confiscated property, which directed that suits brought by claimants of such property should be dismissed by the court on affidavit of the defendant that he was a purchaser from the commissioner, was void."

In *Greene* v. *Briggs et al.*, 1 Curt., 311, speaking of the words "law of the land" in the constitution of Rhode Island, in respect to an act of the legislature of that state which authorized a criminal prosecution upon a complaint against no person in particular and not containing a charge of the substantive facts necessary to constitute the offense, as inoperative thereunder, because such complaint is not due process of law, and holding that the legislature cannot make the right to a trial by jury in a criminal case dependent upon the giving of a bond by sureties for payment of the penalty and costs, Mr. Justice CURTIS says:

"It is equally clear that such a law would not be 'the law of the land,' within the settled meaning of that im-

portant clause in the constitution. Certainly this does not mean any act which the assembly may choose to pass. If it did the legislative will could inflict a forfeiture of life, liberty or property without a trial. The exposition of these words, as they stand in *Magna Charta*, as well as in the American constitutions, has been that they require '*due process of law*'; *and in this is necessarily implied and included the right to answer to and contest the charge*, and the consequent right to be discharged from it, unless it is proved. Lord Coke, giving the interpretation of these words in *Magna Charta* (2 Inst, 50, 51), says they mean due process of law, in which is included presentment or indictment, and being brought in to answer thereto. And the jurists of our country have not relaxed this interpretation."

The right to answer and defend is as secure as the right to sue, and therefore should exist and be asserted upon the same terms. Certainly it should exist in one defendant upon the same terms as it may be exercised by all others in like cases under substantially similar circumstances.

In *Janes* v. *Reynolds*, 2 Texas, 250 (Dec., 1847), the interpretation of the Tennessee court was adopted, and it is there stated:

"They are now, in their most usual acceptation, *regarded as general public laws, binding all the members of the community under similar circumstances*—and not partial or private laws, affecting the rights of private individuals or classes of individuals."

In *Sears* v. *Cottrell*, 5 Mich., 251 (July, 1858), it was said:

"By 'the law of the land' we understand laws *that are general in their operation, and that affect the rights of all alike;* and not a special act of the legislature, passed to affect the rights of an individual against his will and in a way in which the same rights of other persons are not affected by existing laws. Such an act, unless expressly authorized by the constitution, or clearly coming

within the general scope of legislative power, would be in conflict with this part of the constitution, and for that reason, if no other, be void."

In the early case of *Holden* v. *James*, 11 Mass., 405, the following apt language was used:

"It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others *under like circumstances;* or that any one should be subjected to losses, damages, suits or actions, *from which all others, under like circumstances, are exempted.*"

In *Bagg's Appeal*, 43 Pa. St., page 512, it was said:

"There is nothing plainer in the bill of rights than the principle that all men must stand on an equality before the judicial tribunals, and they do not stand so, if the judiciary is bound to admit an inequality created by a legislative decree, by which a statute of limitation or any other element of the remedy is set aside or altered for any particular case or person so as to affect the right. However inexpedient any given change may be, none can complain of inequality in it, if it be made to apply to all alike. And people bear with patience even very defective laws, *when they operate alike on all;* because equality of administration is a large and essential element of justice."

From the foregoing it will be seen that up to the time of formulating the Amendment, it was generally held by eminent authority that "due process of law," as used in a constitutional limitation, was equivalent to prohibition against laws which operated only partially upon individuals or classes of individuals, which imposed penalties or liabilities on some not inflicted on others under the same facts or circumstances, or which denied to them rights not denied to others under similar circumstances or in similar cases. It is only fair to assume that this meaning was intended in the use of the same phrase in the proposed

amendment, and this is emphasized and borne out by coupling such phrase with another guaranteeing to each one equal protection to person and property under the laws as enjoyed by all other persons.

Equal Protection of, or Equality Before, the Law.

The theory of a democratic government is that all citizens have equal rights, so far as the law is concerned, and all are entitled to the same protection. They are all equal members of the state. That every *person* in the community should be guaranteed the right to enjoy equal protection of life, liberty and property as that enjoyed by the *citizen*, is an advance in the science and practice of civilized government and a development of the altruistic idea. It has been frequently advocated by theorists and philosophers, but not often until recently put in practical effect under constitutional guaranties.

John Locke, the great thinker, the interpreter of the English Revolution, and considerably in advance of his age, published in 1689 "Two Treatises of Government," in answer to Sir Robert Filmer's "Patriarcha, or the Natural Power of Kings." It was an argument for civil liberty and limited authority. Many of his views have finally triumphed. In book 2, chapter 11, section 142, on the subject of the extent of legislative power, he said:

"These are the bounds which the trust that is put in them by the society and the law of God and Nature have set to the legislative power of every commonwealth in all forms of government: First, they are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor—for the favorite at court and the countryman at plough," etc

The very first limitation he places on legislative power is that the rule which is to govern should be uniform and general in its operation.

The danger in every republic lies in vesting a majority with great power. It is the danger of factions disregarding and trampling upon the rights of the minority, generally through unjust and unequal legislation which is made effective when executed by the other departments. It was shown in the outrageous, partial and unjust legislation in the new states which had but achieved their independence, and this was one of the causes which aided to bring about the adoption of the Federal constitution. Various plans have been devised to correct this evil. None were found adequate until the adoption of this Amendment, placing the power in the agencies of the Federal government to enforce it, and to thus protect the minority.

See

Note 1, page 55, Ford's Edition of the Federalist.

In No. 10 of the Federalist, which has always been regarded as a great work on government, Mr. Madison said:

"The instability, injustice and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality to contend that they have as effectually obviated the danger on this side as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public

and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."

After speaking of the dangers to be apprehended from factions he continues:

"And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. * * * It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm Nor in many cases can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole. * * * When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add, that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind."

In No. 51 of the Federalist, generally attributed to Madison, but by some to Hamilton, still worthy of either great statesman, it was said:

"*It is of great importance in a republic not only to guard the society against the oppression of its rulers, but*

to guard one part of the society against the injustice of the other part. * * * In a free government the security for civil rights must be the same as that for religious rights. * * * *Justice is the end of government; it is the end of civil society.* It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. *In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.*"

Some time ago De Tocqueville, in his well-known work, "Democracy in America," pointed out the dangers to be apprehended from the vesting of power in a majority, and, therefore, to be apprehended through the exercise of the legislative power. He says, speaking of the tyranny of the majority:

"A majority taken collectively is only an individual, whose opinions, and frequently whose interests, are opposed to those of another individual who is styled a minority. If it be admitted that a man possessing absolute power may misuse that power by wronging his adversaries, why should not a majority be liable to the same reproach? Men do not change their characters by uniting with each other; nor does their patience in the presence of obstacles increase with their strength. For my own part I cannot believe it; the power to do everything, which I should refuse to one of my equals, I will never grant to any number of them."

He further says:

"In my opinion the main evil of the present democratic institutions of the United States does not arise, as is often asserted in Europe, from their weakness, but from their irresistable strength. I am not so much alarmed at the excessive liberty which reigns in that country as at the inadequate securities which one finds there against tyranny.

When an individual or a party is wronged in the United States, to whom can he apply for redress? If to

public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority, and implicitly obeys it; if to the executive power, it is appointed by the majority, and serves as a passive tool in its hands. The public force consists of the majority under arms; the jury is the majority invested with the right of hearing judicial cases: and in certain states even the judges are elected by the majority. However iniquitous or absurd the measure of which you complain, you must submit to it as well as you can."

Again he says:

"I have heard of patriotism in the United States, and I have found true patriotism among the people, but never among the leaders of the people. This may be explained by analogy. Despotism debases the oppressed much more than the oppressor; in absolute monarchies the king often has great virtues, but the courtiers are invariably servile. It is true that American courtiers do not say 'Sire' or 'Your Majesty'—a distinction without a difference. They are forever talking of the natural intelligence of the people whom they serve; they do not debate the question which of the virtues of their master is preeminently worthy of admiration, for they assure him that he possesses all the virtues without having acquired them or without caring to acquire them."

Again, speaking of the unlimited power of the majority, he says:

"Governments usually perish from impotence or from tyranny In the former case their power escapes from them; it is wrested from their grasp in the latter. Many observers who have witnessed the anarchy of democratic states have imagined that the government of those states was naturally weak and impotent. The truth is, that when war is once begun between parties the government loses its control over society. But I do not think that a democratic power is naturally without force or resources; say, rather, that it is almost always by the abuse of its force and the misemployment of its resources that it becomes a failure * * * *If ever the free institutions of America are destroyed that event may be attributed to*

the omnipotence of the majority, which may at some future time urge the minorities to desperation and oblige them to have recourse to physical force. Anarchy will then be the result, but it will have been brought about by despotism."

After quoting with approval the language of Mr. Madison in No. 51 of the Federalist, he continues:

"Jefferson also said: 'The executive power in our government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislature is really the danger most to be feared and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period.'"

This acute observer then adds:

"I am glad to cite the opinion of Jefferson upon this subject rather than that of any other because I consider him the most powerful advocate democracy has ever had."

The danger has always been known. The experiments have been in resorting to means other than a direct constitutional prohibition to correct the evil. Provisions in the Federal constitution were but a partial protection in respect to a few specified subjects. All such expedients have failed. Particularly within the states, notwithstanding apparent guaranties to the contrary, discriminating, unjust and partial legislation has been indulged in. The injustice has been complained of, but it required a loud cry to reach the ear of the average politician or legislator. Not until a time of storm and stress brought statesmen forward was the power for injustice and abuse finally schackled with the manacle of direct prohibition. Not until the ghost of "State's Rights" had been laid,—not until the Nation was regarded as greater and more important than a state—not until the ideas of Hamilton and Marshall had triumphed over those of Jefferson, was it

possible to directly prohibit the states from exercising the "sovereign right" of making and executing unjust, unequal, partial and discriminating laws, and of generally disregarding principles of fairness and honesty.

The great complaint, whether altogether true or not, of unjust and discriminatory laws against recently liberated slaves enacted by their late masters, as might have been expected, was but the occasion for embodying in the Federal Constitution a universal principle of right and justice, forbidding the political power in each of the states to touch the life, liberty or property of the most abject and powerless person, except in pursuance of the same laws which equally affected the majority who promulgated them.

The Amendment as Proposed by Congress.

The first session of the Thirty-ninth Congress will ever be memorable. It was in the days of Reconstruction. Whatever may be said of its leaders, it must be admitted that they were men of intellect, with strong sense of right and a determined purpose. Thaddeus Stevens in the house and Charles Sumner in the senate were both, and always had been, the great champions and advocates of equality of civil rights and of all persons before the law. We may trace through that first session the gradual formation of the joint resolution proposing the Fourteenth Amendment. Whatever opposition was made to other provisions, no objection was or could be made to the manifest justice of the equality clause. First, the theory was to make the late slave a citizen and thus secure to him rights as such, but finally the resolution or amendment was so drafted as to guarantee to every person affected

by the laws of the state the same rights and protection in life, liberty and property as that enjoyed by the citizens or the most favored in that state.

On December 5th 1865, Mr. Stevens introduced the following joint resolution, proposing an amendment to the constitution, to-wit:

"Article 13. All national and state laws shall be equally applicable to every citizen, and no discrimination shall be made on account of race and color."

Congressional Globe, first session, 39th Congress, p. 10.

Shortly thereafter, Mr. Bingham of Ohio introduced a joint resolution to amend the constitution so as to empower Congress to pass all necessary and proper laws "to secure to all peasons in every state of the Union equal protection in their rights, life, liberty and property."

Id., page 14.

Mr. Sumner, in the senate, offered a joint resolution:

"That there shall be no oligarchy, aristocracy, caste or monopoly invested with peculiar privileges or powers, and there shall be no denial of rights, civil or political, on account of color or race anywhere within the limits of the United States, but all persons therein shall be equal before the law, whether in the court room or at the ballot box."

He then made his great argument for impartial laws, asserting that "men have a natural right to *impartial laws* by which they shall be secured in *equal rights*."

Congressional Globe, first session, 39th Congress, part 1, pages 674, 675, 680–686.

On January 22, 1866, Mr. Stevens, for the joint committee on reconstruction, reported the joint resolution proposing an amendment, as follows:

"Article . Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed; provided that whenever the elective franchise shall be changed and abridged in any state on account of race or color, all persons of such race or color shall be excluded from the basis of representation."

Congressional Globe, part 1, first session, 39th Congress, page 351.

A few days afterwards, on February 26, Mr. Bingham, from the joint committee on reconstructfon, reported back a joint resolution proposing an amendment to the constitution of the United States, as follows:

"Article . The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states, and to all persons in the several states equal protection in the rights of life, liberty and property."

Congressional Globe, part 1, first session, 39th Congress, pages 1033, 1034.

The ideas contained in the foregoing resolutions were generalized and embodied in the terse language found in the Amendment.

In the meantime, on April 9th, 1866, the house and senate passed "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication."

See

Chapter 31, page 27, 14 U. S. Statutes at Large.

The first section read:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as enjoyed by white citizens, and *shall be subject to like punishment, pains and penalties and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.*"

There was some doubt as to the constitutionality of this statute, which hastened action on the joint resolutions, and finally, on April 30, 1866, the joint resolution proposing an amendment to the constitution of the United States in the exact language of the Fourteenth Amendment was reported to the house by Mr. Stevens, for the joint committee, and shortly afterwards adopted by both houses.

Congressional Globe, first session, Thirty-ninth Congress, page 2286.

In speaking of the proposed amendment he, who had taken such a prominent part in formulating it, said (see page 2459):

"The first section prohibits the state from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty or property, or of denying to any person within their jurisdiction the 'equal' protection of the laws.

"I can hardly believe that any person can be found who will not admit that every one of these provisions is

just. They are all asserted, in some form or other, in our Declaration or organic law. But the constitution limits only the action of Congress, and is not a limitation on the states. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the states, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now, different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now, color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the constitution should restrain them, those states will all, I fear, keep up this discrimination, and crush to death the hated freedmen. Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority," etc.

Here he refers to the distinction and discrimination made between the white and the black man, merely by way of illustration, because it was the one then most apparent, and the discrimination most flagrant.

On May 31st, 1870, in pursuance of the amendment, an act was passed in which, by section 18, it is provided:

"That the act to protect all persons in the United States in their civil rights and furnish the means for their vindication, passed April 9, 1866, is hereby re-enacted."

16 U. S. Statutes at Large, page 144.

In section 16, page 144, of the last named act, it is provided:

"That all *persons* within the jurisdiction of the United States shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, *and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.*"

Mr. EDMUNDS, who was in the senate at the time, afterwards stated in his argument before this court, in the *San Mateo* case, as quoted by Mr. Justice Field in 18 Fed. Rep., 398:

"'There is no word in it that did not undergo the completest scrutiny. There was no word in it that was not scanned, and intended to mean the full and beneficial thing that it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand, which was not considered. And the purpose of that long and anxious consideration was that protection against injustice and oppression should be made forever secure; to use his language, 'secure not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial powers, the legislative powers and the executive powers of the whole body of the states and the whole body of the people.'"

The ideas of Mr. Justice Wilson concerning the state, expressed in *Chisholm* v. *Georgia*, seem in a measure to have again prevailed. No state is so sovereign that it can be oppressive and unjust. All oppression or injustice on the part of the state is an example and a justification for oppression and unfair dealings between the citizens. The morals of the constituent members cannot be expected to rise superior to that of the aggregate.

Due process of law in any event was intended to guarantee to all a right to a hearing in the courts, at least as to controversies between private parties; and the "equal protection of the laws" was a guaranty that this right, among others, should be equally protected; that is, exercised by all equally or upon the same terms.

So it was said by Mr. Justice FIELD, in 18 Fed. Rep., on page 398:

"No state—such is the sovereign command of the whole people of the United States—no state shall touch the life, the liberty or the property of any person, however humble his lot or exalted his station, without due process of law; *and no state, even with due process of law, shall deny to any person within its jurisdiction the equal protection of the laws.*"

Like all constitutional provisions, it was purposely couched in brief and terse phraseology, in order that there might be a breadth of meaning and interpretation.

Thus, around those fundamental rights, created and cherished by the common law, or by universal principles of justice, for the protection, enjoyment and defense of life, liberty and property, is drawn the magic circle of the constitution, within which the sword of power cannot be thrust without being shattered.

INTERPRETATION OF THE AMENDMENT.

It is manifest from the foregoing, as well as the decisions which follow, that one of the great purposes of the equality clause was to prevent unjust, discriminating and class legislation. It was to prevent the majority in the state from enacting laws which would not be binding upon all generally in the community, especially themselves, under like circumstances. It is such a great ad-

vancement in justice and fair dealing that its great purpose ought not to be construed away by refinement. There is no great difficulty in framing general laws, binding equally upon all, and at the same time protecting public interests. The Mosaic Code, which has furnished the basis of moral laws for civilized nations for ages, was couched in general terms applicable to all. "Thou shalt not" referred to everyone in the nation. The laws of the Universe are uniform and general. "Of *law* there can be no less acknowledged than that her seat is the bosom of God; her voice the harmony of the world." But it is said the law is a progressive science and there must be scope for legislation. True, but the greatest progress is found in this constitutional law. Progress should be along the lines of impartialty and equality before the law. Partial and unjust laws show a backward movement. It is only when the majority desire to inflict upon a very small minority penalties under laws which they do not wish to be applicable to themselves that it becomes necessary to make an invidious classification. The expressions of this court bear out our contention, that laws are impartial and valid only when they operate on all alike under similar circumstances. It is true it is said in some cases that a classification may be made by the legislature, but, as will be shown hereafter, such classification must be reasonable and just, must be of objects not persons, and must be in effect of such a general nature that it will practically include and affect alike all persons in the community under substantially similar circumstances.

The law which we are attacking refers solely to actions against "railroad companies" for damages

caused by the negligent setting out of fires. It is only to such actions against railroad companies alone that it is applicable. Why such invidious discrimination should be made is not apparent. It is not that railroad companies unjustly litigate claims of this nature because it applies equally to claims which are litigated in good faith. It is not that railroad companies are more negligent than others in the community, for their business is conducted by individuals who presumably exercise as much care as other individuals in the community. But the penalty of an attorney's fee imposed is not to make railroad companies more careful, for it is not imposed before litigation, but only attaches as a result of unsuccessfully defending and the statute does not prescribe what degree of care or what precaution shall be used.

The statute prescribes no precaution to be taken, and under the law the railroad company is to only exercise reasonable care—the same degree of care as that exercised by other individuals using in their business the element of fire. The wrong is no greater when committed by a railroad company than by a farmer in the use of a steam thresher. Should not the same penalty, if by an unreasonable conclusion it may be said to be imposed on account of negligence, be also imposed upon all who permit fire to negligently escape and destroy the property of others? Is not the consequence or result of the negligence the same? Upon what unjust and unequal terms is a railroad company permitted to defend such an action as against the plaintiff who brings it? At what a disadvantage is not the railroad company placed? Where is the boasted equality of the laws or rules which govern others in like actions? Where the equality in the right to resort to the courts?

The statute of Kansas must be examined with candor to ascertain its real purpose, and this purpose should not be hidden or glossed over with artificial reasons or excuses to sustain the law. Judges who laud this great provision, and at the same time support such a law by far-fetched reasons or pretended classifications, are indeed those

> "That keep the word of promise to the ear
> And break it to the hope."

Speaking of the Civil Rights Act and this provision it is said, in Story on the Constitution, Vol. II (5th Ed.), Sec. 1936:

"To be protected in life and liberty, and in the acquisition and enjoyment of property under equal and impartial laws which govern the whole community. This 'puts the state upon its true foundation; a society for the establishment and administration of general justice—justice to all, equal and fixed, recognizing individual rights and not imparting them.' It recognizes 'the important truth—in a republican government, the fundamental truth—that the minority have indisputable and inalienable rights; that the majority are not everything and the minority nothing; that the poople may not do what they please, but that their power is limited to what is just to all composing society.'"

In the early case of *County of San Mateo* v. *Southern Pacific R. R. Co.* (also known as the Railroad Tax Cases), decided in 1882, 13 Fed. Rep., 722, there is an able and thorough discussion of this amendment by Mr. Justice Field and Circuit Judge Sawyer. On page 733, Mr. Justice FIELD said:

"The fourteenth amendment to the constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive anyone within the jurisdiction of the

equal protection of the laws. And by equal protection of the laws is meant equal security under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. *It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts* but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances.

"Unequal exactions in every form, or under any pretense, are absolutely forbidden."

So in another early case under this provision, thoroughly argued by eminent counsel—*County of Santa Clara* v. *Southern Pacific Ry. Co.*, 18 Fed. Rep., 385, on page 398, Mr. Justice FIELD, in an elaborate opinion, said:

"With the adoption of the amendment the power of the states to oppress any one under any pretense or in any form was forever ended: and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life, to liberty, to property and to the pursuit of happiness. *It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances.*"

In *Pace* v. *Alabama*, 106 U. S., 584, the same distinguished justice said:

"The counsel is undoubtedly correct in his view of the purpose of the clause of the amendment in question, that *it was to prevent hostile and discriminating state legislation against any person or class of persons. Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others to the courts of the country for the security of his person and property*, but that in the administration of criminal justice he shall not be subjected, for the same offense, to

any greater or different punishment. Such was the view of Congress in the enactment of the Civil Rights Act of May 31, 1870, c. 114, after the adoption of the amendment. That act, after providing that all persons within the jurisdiction of the United States shall have the same right, in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, declares in Sect. 16 that they 'shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.'"

In the Civil Rights Cases, 109 U. S., on page 24, Mr. Justice BRADLEY said:

"The fourteenth amendment extends its protection to races and *classes*, and prohibits any state legislation which has the effect of denying to any race or *class*, or to any individual, the equal protection of the laws."

In *Hurtado* v. *State of California*, 110 U. S., on pages 535 and 536, Mr. Justice MATTHEWS said:

"But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities *under the protection of the general rules* which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other sim-

ilar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the government, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In *Yick Wo* v. *Hopkins*, 118 U. S., on page 370, Mr. Justice MATTHEWS said:

"But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization *under the reign of just and equal laws*, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.'"

In *Leeper* v. *Texas*, 139 U. S., pages 467 and 468, Mr. Chief Justice FULLER said:

"That by the fourteenth amenement the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons *or classes of persons of equal and impartial justice under the law;* the law in its regular course of administration through the courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that *due process is so secured by laws operating on all alike*, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of

private rights and distributive justice. *Hurtado* v. *California*, 110 U. S., pp. 516–535, and cases cited."

A number of similar expressions of this court might be quoted, but the case of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S., 150, is conclusive in principle and reason A statute of Texas provided that if a *bona fide* claim of not more than $50 against a railway company for personal services or damages for overcharges on freight, or for destruction or injury to stock by its trains, was not promptly paid when presented under oath, and the claimant was thereby compelled to resort to a suit, the corporation, if ultimately defeated in the suit, should pay the plaintiff an attorney's fee of $10, as part of the costs of the litigation. This law requiring the claim to be sworn to was more just than the Kansas act, which does not even require a previous demand. The action was one to recover for the value of a colt killed by an engine. The Court of Civil Appeals of Texas held the statute valid, as an exercise of police power, since under the law of Texas the railroad company was required to fence its tracks, and that court said this fee was imposed as a penalty for failure to fence. The Supreme Court of Texas, however, held that the statute was valid as an exercise of political power of the state, and therefore no reason was necessary to uphold the law—a unique position to be taken at this day under a constitutional government! This court very justly held the statute to be void, in that it operated to deprive the railroad companies of property without due process of law, and denied to them the equal protection of the law, in that it singled them out of all citizens and corporations and required them to pay in certain cases attorney's fees to parties successfully suing then, while it gave to

them no like or corresponding benefit. There the attorney's fee was given in certain classes of cases, as in the case at bar; but, because it did not give the railroad companies when successful a like fee in such cases, and because no such penalty was imposed upon others in the community in similar cases, it was held to deny the equal protection to railroad companies enjoyed by others under the general laws of the state.

There are a number of well-considered cases similar to the one at bar, where statutes imposing attorney's fees have been held void, as contrary to the principle contained in this Amendment.

The case of *Wilder* v. *Railroad Company* 70 Mich., 382, was decided by a court noted generally for its high standing and good common sense. It was there held that the public acts of that state, authorizing an attorney's fee of $25 to be taxed against a railroad company in case of judgment against it in an action for injuries to stock, on account of the failure of the company to fence its tracks as required by the act, was unconstitutional and void; as being an attempt to grant special advantages to one class at the expense and to the detriment of another. In that case Judge MORSE said:

"But the imposing of the attorney fee of $25 as costs cannot be upheld. *The legislature cannot make unjust distinctions between classes of suitors* without violating the spirit of the constitution. *Corporations have equal rights with natural persons as far as their privileges in the courts are concerned.* They can sue and defend in all courts the same as natural persons, and *the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a pen-*

alty of $25 if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of $10 in justice court, but if he succeeds because of the negligence of the company the plaintiff is permitted to tax the $10 and an additional penalty of $25—*for it is nothing more or less than a penalty. Calling it an 'attorney fee' does not change its real nature or effect. It is a punishment to the company and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist.* 'The genius, the nature and the spirit of our state government amounts to a prohibition of such acts of legislation, and the general principles of law and reason forbid them.' *Durkee* v. *City of Janesville*, 28 Wis. 464, 468; *Calder* v. *Bull*, 3 Dall., 387, 388. *Here the legislature has granted special advantages to one class at the expense and to the detriment of another, and has undertaken to make the courts themselves the active agents in this injustice, and to force them to impose penalties, in the disguise of costs, upon railroad companies for simply exercising, in certain cases, the common right of every person to make a defense in the courts when suits are brought against them. It was suggested by plaintiff's counsel, upon the argument, that the $25 is not imposed by the statute as a matter of distinction between the suitors, but as a punishment to the corporation for not obeying the law as to the fencing of its right of way,* and that if the railway company properly fenced its tracks and complied with the law, it might then stand equal in the courts with the plaintiff in actions of this kind. But *penalties cannot be prescribed and enforced in this way, and, whatever may have been the object or intent of the legislature,*

the result of the statute is an injustice and an inequality, as before shown, *which the courts cannot tolerate*, and must disregard in the administration of the laws."

This case was followed and approved in *Lafferty* v. *C. & W. M. Ry. Co.*, 71 Mich., 351.

In *Grand Rapids Chair Co.* v. *Runnels*, 77 Mich., 104, it was held that certain public acts of that state authorizing an attorney's fee to be taxed by the justice of the peace in entering judgments for personal services rendered by plaintiff were unconstitutional and void.

In *Joliffe* v. *Brown et al.* (1896), 14 Wash., 155; s. c., 44 Pac. Rep., 149, it appeared that the statute of that state provided that failure to fence a railroad should be *prima facie* evidence of negligence in stock-killing cases. It was held that the provision of that statute granting an attorney's fee to the plaintiff who should recover from the railroad company for damages to stock, was invalid where no attorney's fee was granted to the railroad company if it successfully defended the action, being an attempt to grant special privileges and advantages to one class of litigants. Instead of attempting to defend the law by saying that the attorney's fee was imposed to insure care on the part of the railroad company, that court said, with manifest good reason:

"Legislation requiring railroad companies to pay an attorney's fee in case of litigating such claims unsuccessfully, where none was imposed upon the plaintiff if unsuccessful, has been sustained in some instances, and generally upon the ground that it was in the nature of a penalty for failure to perform a duty imposed by statute. * * * It cannot be sustained here as a penalty, for, as has been said, there was no duty to fence imposed by statute, and the provision requiring the notice to be given cannot be sustained in the unlimited manner in which the power was sought to be exercised as

expressed in the section. There is a broad distinction to be recognized between legislation requiring a party to pay actual damages occasioned, and that which would impose a penalty in addition thereto. Such legislation can be sustained only where the party on whom the penalty is imposed is in fault or guilty of a wrong. *Considered as an attorney's fee purely and simply, it distinguishes between classes of persons and not as to subjects of litigation or classes of controversies*, and by the weight of authority has been held to be unconstitutional."

In *South and North Alabama Ry. Co.* v. *Morris*, 65 Ala., 194, a section of the statute of that state which required a reasonable attorney's fee, not exceeding twenty dollars, to be assessed by the court as a part of the costs against every unsuccessful appellant in *certain actions*, was held invalid and void, as violative of that equality and uniformity of rights and privileges which, by the fundamental principles of the constitution, State and Federal, are secured to all persons, and creating unjust and unequal discriminatian against a particular class of litigants.

Referring to the provisions of the state constitution and to the Fourteenth Amendment, Judge SOMERVILLE said, pages 199, 200 and 201:

"The clear legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a *basis of equality in the enforcement and defense of their rights in courts of justice* in this state, except so far as may be otherwise provided in the constitution. This right, though subject to legislative regulation, cannot be impaired or destroyed under the guise or devise of being regulated. *Justice cannot be sold, or denied, by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of*

arbitrary, unjust and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions."

After quoting with approval from *Wally* v. *Kennedy*, 2 Yerger, 554, and *Holden* v. *James*, 11 Mass., 296, he continues:

"The section of the code under consideration (Sec. 1715) prescribes a regulation of a peculiar and discriminative character, in reference to certain appeals from justices of the peace. *It is not general in its provisions, or applicable to all persons, but it is confined to such as own or control railroads only; and it varies from the general law of the land, by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax-fee*, not to exceed twenty dollars. A law which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject matter of litigation, and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants or ministers of the gospel, would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights of every state constitution of the various commonwealths of the American government. We think this section of the code is antagonistic to these provisions of the state constitution, and is void. *Durkee* v. *City of Janesville*, 28 Wis., 464; *Gordon* v. *Winchester Association*, 12 Bush, 110; *Greene* v. *Briggs*, 1 Curtis, 327; Cooley's Const. Lim. (3d Ed.), Sec. 393.

"The section in question is also violative of that clause in section 1, Art. XIV, of the Constitution of the United States which declares that no state shall 'deny to any person within its jurisdiction the *equal protection of the*

laws.' This guaranty was said by Justice Bradley, in *Missouri* v. *Lewis* (101 U. S., 1 Otto, 22, 30), to include 'the equal right to resort to the appropriate courts for redress.' 'It means,' as was further said by the court, 'that no person or class of persons should be denied the same protection which is enjoyed by other persons, or other classes, in the same place and under like circumstances.'

"The same court, in *United States* v. *Cruikshank*, 92 U. S. (2 Otto), 542, 555, per WAITE, C. J., used the following language in discussing the foregoing constitutional clause: 'The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states, and it still remains there.' *Ward* v. *Flood*, 48 California, 36."

In *Randolph et al.* v. *Builders & Painters Supply Co.*, 106 Ala., 501 (17 Sou. Rep., 721), the Supreme Court of Alabama, in 1895, held that the provisions of an act of that state, providing that persons mentioned therein as being entitled to certain liens, should have a lien for attorney's fees, was in conflict with the constitution of the state, providing that all citizens of the state should have equal civil and political rights, and with the section providing that all courts should be open, and every person, for any injury done him in lands, goods, person or reputation, should have a remedy by due process of law. On page 723 it is said:

"It is contended that the act in question violates these provisions of the constitution in that it allows a fee to the plaintiff's attorney for prosecuting his suit successfully, whereas, a like fee is not allowed the defendant's attorney, in case the plaintiff fails in his suit, and on that account it is discriminative and class legislation. In Michigan they had a statute similar to the one in hand, which allowed $5 attorney's fee as part of plaintiff's cost in a log-lien suit. The Supreme Court of that state de-

clared the provision for an attorney's fee to be unconstitutional, holding that all persons having equal rights before the law, which must be administered before them as suitors with the same equality and justice, without which it would become an engine of tyranny. * * * The Supreme Court of Wisconsin, discussing the same principle, declares that there can be no discriminative advantage bestowed by law between parties to the same suit, giving one most unjust pecuniary advantages over the other, and employs the following language which is applicable to our case: 'Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision' of the constitution."

In *Hocking Valley Coal Co.* v. *Rosser*, 53 Ohio St., 12, it was held that a certain section of the Revised Statutes, providing:

"If the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of $5, for his attorney; but no such attorney fee shall be taxed in the costs unless said wages shall have been demanded in writing, and not paid within three days after such demand; if the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum, exclusive of interest, from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of $15, for his attorney, as the court may allow,"

was unconstitutional and void.

BRADBURY, J., delivering the opinion of the court, said:

"Under the statute, to entitle the plaintiff to have an attorney fee taxed against the defendant, he is not required to show that the debtor had funds which he wilfully or arbitrarily or even carelessly refused to apply to

pay his debts, nor that a vexatious or dilatory defense had been made to defeat or delay the judgment. No other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him.

"Whether the debtor interposes or shows a vexatious defense, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are all equally immaterial; in either case the statute denounces against him a penalty called an attorney fee if an action is brought on the claim and judgment recovered for the sum demanded.

* * * * *

"*Upon what principle can a rule of law rest which permits one party or class of people to invoke the action of our tribunals of justice at will while the other party or another class of citizens does so at the peril of being mulcted in an attorney fee if an honest but unsuccessful defense should be interposed?*

"*A statute that imposes this restriction upon one citizen or class of citizens only denies to him or them the equal protection of the law.*"

After referring to provisions in the statute he continued:

"The right to protect property is declared as well as that justice shall not be denied and every one entitled to equal protection. *Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property.*"

In *New York Life Ins. Co.* v. *Smith*, 41 S. W. Rep., 680, the Court of Civil Appeals of Texas, in 1897, after the ruling of this court in the Ellis case, held void, as in violation of the Fourteenth Amendment, a statute of that state providing that in all cases where loss occurs, and a

life or health insurance company, liable therefor, fails to pay the same within the time specified in the policy, after demand made, it should be liable to the holder of such policy, in addition to the amount of such loss, for 12 per cent. of the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of the same.

In such a statute we may observe the gradual growth and extension of invidious class legislation.

In *Chicago, St. Louis & New Orleans R. R. Co.* v. *Moss*, 60 Miss., 641, "An act for the relief of certain litigants" provided that whenever an appeal should be taken from the judgment of any court in any action for damages brought by any citizen of the state against any corporation, a reasonable attorney's fee for the appellee should be assessed by the court and certified by the clerk of the court, and upon affirmance of the judgment, a judgment for the amount so assessed should be rendered in favor of the appellee and against the appellant. This act was held unconstitutional, as discriminative between classes of persons as to the incidents of an appeal, being violative of that principle of personal equality before the law and in the courts. In the opinion it is said:

"*All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law and before the tribunals for administering it*, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances.

"There may be different rules for appeals and their incidents in different classes of cases, determined by their nature and subjects, but not with respect to the persons by or against whom they are instituted.

"The subjection of every unsuccessful appellant to a

charge for the fee of the attorney for the appellee would afford no ground for complaint as unequal, for it would operate on all, and such a rule for the unsuccessful appellant in certain causes of action, tested by the nature and subject of the actions, will be equally free from objection on the ground of its discriminating character; but to say that where certain persons are plaintiffs and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens not imposed on unsuccessful appellants generally is to deny the equal protection of the law to the party thus discriminated against. It is to debar certain persons from prosecuting a civil cause before the appellate tribunals of this state.

"It is an unwarrantable interference with the 'due course of law' prescribed for litigants generally. * * *

"It is doubtless true that the act was designed for the relief of citizens who became litigants in actions against corporations, because it applies only when a citizen is plaintiff, *and it was assumed that the corporation would be appellant, and to avoid discrimination between parties to the same action it was made to operate on either party as appellant*, but it sometimes occurs, and may very often, that the citizen plaintiff is an appellant, and in such cases the discrimination may operate oppressively on him.

"The Supreme Court of Alabama declared its act violative of the constitution of that state and of the United States, because of its unjust discrimination in establishing peculiar rules for a particuliar occupation, *i. e.*, such as own or control railroads.

"Our objection to the act under consideration is broader, as shown above, embracing in its scope the right of a citizen who sues a corporation, for whom we assert the right of appeal on the same terms granted to the plaintiffs in like cases, *i. e.*, actions for damages against whomsoever brought.

"*The act was intended to deter from the Appellate Court corporations against whom judgments should be rendered for damages, or citizens of this state suing them for damages. It was conceived in hostility to citizens as plaintiffs or corporations as defendants in such actions. In either view it is partial and discriminating against classes of litigants*, denying them access to the appellate

courts on the same terms and with the same incidents as other litigants who may be plaintiffs or defendants in actions for damages. It is not applicable to all suitors alike in the class of actions mentioned by it.

* * * * *

"An act 'which is partial in its operations, intended to affect particular individuals alone or to deprive them of the benefit of the general laws, is unwarranted by the constitution and is void.' 'A partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general laws of the land, is unconstitutional and void.'"

In Arkansas, a statute provided for the selection of arbitrators by the owners of stock killed and the railroad company who should be required to assess the value of the stock killed; that in the event the railroad company, within thirty days, failed to tender the amount so assessed to the owner, and in any subsequent suit for the value of the stock in which the owner should recover, reasonable attorney's fees should be taxed against the railroad company. In the event the owner refused to accept the amount tendered, and afterwards sued, if he failed to recover a greater amount than that assessed by the arbitrators, reasonable attorney's fees should be taxed against him.

In the case of *St. Louis Rly. Co.* v. *Williams*, 49 Ark., 492 (31 A. & E. R. R. Cases, page 555), the Supreme Court of Arkansas construed this provision allowing attorneys fees to be, in effect, a penalty for failure to abide by the award of the arbitrators, and held the act unconstitutional.

The court said:

"*Everyone is entitled*, under the Constitution, *to have* his rights enforced, his wrongs redressed and *his liabilities*

determined in the courts whenever it becomes necessary to compel their enforcement, redress or adjustment, and when he is liable for damages, as the appellant is in this case, to have the damages he shall pay assessed by a jury. *The legislature has no power* to substitute boards of arbitration for the courts without the consent of the parties, and *to make* their awards obligatory, and *the exercise of the right to seek the aid of the courts to obtain relief a wrong or impose upon anyone a penalty for exercising such right.*"

In *D. & R. G. Ry. Co.* v. *Outcalt*, 2 Colo. App., 395, s. c. 31, Pac. Rep., 177, the statute of that state which made railroad companies liable absolutely for stock killed, without regard to the question of negligence or the violation of any statute enacted in the exercise of the police power, and the section which imposed a penalty of double the appraised value of the animals killed, together with an attorney's fee, for failure to pay within thirty days, was held to be repugnant to the provisions of the Constitution, which provided that no person should be deprived of life, liberty or property without due process of law. In the opinion, Judge REED said:

"The statute under consideration in this case, as construed and applied, violates the Fourteenth Amendment of the Constitution of the United States. * * * It is also in violation of section 25, Bill of Rights of this state, which declares 'that no person shall be deprived of life, liberty or property without due process of law.' Though differing slightly in wording, the same declaration or provision occurs in the constitutions of all the states, a principle asserted in *Magna Charta*, which was embodied in, and became a fundamental principle of, the common law, asserting the inviolability of the equality of all persons before the law, and prohibiting class or discriminating legislation. In the old case of Dr. Bonham, 8 Coke. 118 a, Lord COKE said: 'It appears in our books that in many cases the common law will con-

trol acts of parliament, and adjudge them to be utterly void; for, when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.' * * * 'Due process of law' has been frequently and variously defined, the result reached in each instance being the same. The briefest and most comprehensive definition is that of Johnson, J., in *Bank* v. *Okely*, 4 Wheat., 244: 'They were intended to secure an individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

He then quoted section 1935, Story on the Constitution, and section 356, Cooley's Constitutional Limitations, and other authorities, and continued:

"The same principle is recognized and ably asserted by Beck, C. J., in *Re Lourie*, 8 Colo., 499, 9 Pac. Rep., 489: 'Properly construed, these maxims interpose no barriers in the way of wholesome legislation of any kind, but they prevent *special and class legislation, and all forms of legislation the effect of which is to extend privileges and securities to a portion of the community which are withheld from another portion*, although relating to the same class of subjects. So far as the laws are conformable to the constitutional provision guaranteeing equal and impartial security and the protection of the rights of the whole community, they become the law of the land, and the adjudication of individual rights thereunder is by due process of law. The same principles are applicable whether we refer to the enactment of laws by general assemblies or to their judicial interpretation. They must be so framed and so administered as to come within the constitutional landmarks, abridging the immunities and privileges of no person, but affording equal protection to all.'"

In *Durkee* v. *City of Janesville*, 28 Wis. 464, will be found a clear and forcible statement of this fundamental principle. The charter of that city provided that no costs should be recovered against the city in any action

brought to set aside a tax assessment or to prevent the collection of taxes. This was held unconstitutional as being an attempt to exempt a particular corporation from the operation of the general laws. The learned chief justice in that case, on pages 466 and 467, after referring to a number of decisions, notably those of Tennessee, said:

"The principle thus clearly shown by the decisions, if applicable to the acts under consideration, seems conclusive against their validity. And I think they are invalid. Certainly no discrimination more arbitrary, unjust and odious, between one individual or corporation and another, or every other, in a matter where the rights and privileges of all should be equal, could well be, than would thus be established, if such laws were valid. The City of Janesville would have a special privilege or advantage not given to any other like corporation under the same circumstances. But the most odious feature of the law would appear from its application as between the immediate parties to the suit. No costs could be recovered against the city in this particular class of cases. That is the extent of the supposed suspension or repeal of the general law. Costs may be recovered by the city, or taxed in its favor. In this case, had the city prevailed or the plaintiff been the losing party, costs must have been taxed against the plaintiff according to the general law. Thus, whilst the city would recover costs upon judgment in its favor, it would pay none, and not be liable for any, if the opposite party were successful. The costs and expenses taxable by law in every suit involving important questions like those affecting taxation and assessments, are very considerable and especially in this court. The costs here were taxed by the clerk at $141. If successful, the city would have recovered them against the plaintiff; but if unsuccessful, it is claimed that the plaintiff shall recover nothing. Words cannot make the inequality and injustice of the rule plainer than it thus appears; and the question is, whether the legislature can so discriminate between suitors or parties to the same litigation in a court of justice, as that one of them shall

have such special and important pecuniary advantage over the other? I, for one, think not, and in declaring my opinion, I care very little whether it is placed on those fundamental principles of law and justice which, in our form of government, it has been held no legislative body can override, even though not prohibited by the written constitution, or upon the provisions of the constitution itself, some of which clearly forbid the enactment of such laws."

Again, on page 469, after referring to illustrations of implied limitation upon the legislative power, he said:

"It seems to be true, therefore, of written constitutions as of statutes, that 'when made, there are some things which are exempted and *fore-prized* out of the provisions thereof, by the law of reason, though not expressly mentioned.' Potter's Dwarris, 123. The grant of legislative powers, though without prohibition or restraint that the legislature shall not discriminate and do gross and palpable injustice between man and man by the passage of unequal and partial laws, does not carry with it the power to pass such laws. Such a power, from its very nature and of necessity, is 'fore-prized' and taken out of the grant, without any express exception or limitation and the act, though in form of law, yet, not being within the scope of the authority conferred, is not legislation at all, and so is void."

Again, on pages 470 and 471, he continues:

"In Tennessee, acts of this kind are adjudged invalid as contravening the declaration in their bill of rights that no freeman shall be disseized of his freehold or deprived of his property but by the judgment of his peers *or the law of the land*. The clause '*law of the land*' is held to mean a general public law, equally binding upon every member of the community. 2 Yerg., 554, 599. We have not that clause in our declaration of rights, but we have one which is equivalent in meaning and effect. Section 9, Art. 1, declares: 'Every person shall have *a certain remedy* in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely and without

being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.' I had occasion to express my views of the proper construction and effect of this section in *Phelps* v. *Rooney*, 12 Wis., 705, 706. It is obvious there can be no *certain* remedy in the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter and spirit of this provision.

"Certainty of remedy implies uniformity of remedy, and equality of rights and privileges in all things respecting it, which can only be obtained by general laws equally binding upon every member of the community. The language denotes that there can be but one remedy for all similar cases, which must operate upon all persons or parties alike, and be equally free and favorable to all."

This authority has always been cited with approval.

There are also many illustrations of laws held invalid as discriminating in the liability imposed or freedom from the same in respect to certain classes, and also in respect to the cases against which there was a discrimination in the remedy.

In *Atchison & Nebraska R. R. Co.* v. *Baty*, 6 Neb., 37, it was held that a statute giving the owner of live stock double the value of such property injured or killed on a railroad track by the cars of a railroad company, in case the same was not paid within thirty days after demand made therefor upon the company, was void. In the opinion in this case will be found a discussion of the

phrase "due process of law" and "law of the land," and it is said:

"The statute seems to be obnoxious to another just rule in the administrative policy of the government. It may be considered a well-settled rule in respect to the operation of the laws, that corporate companies and natural persons are placed precisely upon the same ground; and 'this is the true ground, and the only one upon which equal rights and just liabilities and duties can be fairly based.' Now, the statute in question is partial. It applies to one class only; but it is said that the law makers 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at plough,' and this rule is said to be 'a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.'"

In *Brown* v. *Alabama Great So. R. Co.*, 87 Ala., 370 (6 Sou. Rep., 295), decided by the Supreme Court of Alabama in 1889, it was held that the code of that state limited the jurisdiction of justices of the peace in actions sounding in tort to $50; and that section 1149, extending the jurisdiction in suits against a railroad company for killing stock to $100, was unconstitutional, on account of discrimination.

In *O'Connell* v. *Menominee Bay Shore Lumber Co.* (Sup. Court of Michigan, 1897), 71 N. W. Rep., 449, it was held that a statute of the state which permitted the service of process in counties adjoining that in which the court issuing it was held, in certain actions, was invalid because class legislation, in that it gave special privileges to suitors on specified classes of claims.

In *San Antonio & Aransas Pass Railroad Co.* v. *Wilson*, 50 Am. & Eng. R. R. Cases, 513, s. c., 19 S. W. Rep., 911, it was held that a statute rendering rail-

road companies liable to pay their employes twenty per cent. on the amount due them as wages, in addition to such amount, where such companies refuse to pay their indebtedness to their employes within thirty days after demand, was special legislation and therefore unconstitutional and void.

In *City of Jacksonville* v. *Carpenter*, 77 Wis.,.288, it was held that an act of the legislature prohibiting certain riparian owners to certain places on Rock river from forcing piles into the river and building on the same, etc., and authorizing injunctions to restrain such building, was unconstitutional and void, as class legislation.

Among other things, it is said in the opinion:

"This statute is discriminating and class legislation, in violation of the spirit of our constitution, and contrary to the principles of civil liberty and natural justice. It gives to a certain class of citizens privileges and advantages which are denied to all others in the state under like circumstances, and *subjects one class to losses, damages, suits or actions from which all others under like circumstances are exempted.*"

In *Park* v. *Detroit Free Press*, 72 Mich., 560, it was held that the Michigan statutes relieving publishers of newspapers from all but actual damages to property and business, in actions for libel, if the publication was by mistake and in good faith, and did not involve a criminal charge, and was followed by a correction, were unconstitutional. In a sensible opinion, Judge CAMPBELL said:

"This statute has not apparently attempted to relieve any person but the publishers of newspapers from responsibility for every injury to character by libel, whether intentionally false or not. If a person not a publisher had written in a letter just what this paper published, and had done so under the same impression which Mr. Rob-

inson had, the statute would not save him from full responsibility for the damages of all kinds to which the general rules of law have always subjected persons guilty of libel. * * * It is not competent for the legislature to give one class of citizens legal exemptions from liability for wrongs not granted to others. And it is not competent to authorize any person, natural or artificial, to do wrong without answering fully for the wrong."

In *Smith* v. *Louisville & Nashville R. R. Co.*, 75 Ala., 449, it was held that the provision of the code of that state, providing that when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother may maintain an action against such corporation, or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess, created a new cause of action, was highly penal in its terms, and was discriminating and unconstitutional.

In *Pearson* v. *City of Portland*, 69 Me., 281, it appeared that the legislature of Maine provided in an act passed in 1872 that no person should recover damages from any city for any injury to property claimed in consequence of any defect, provided said damage be done to any person who was at the time a resident of any country where damages under similar circumstances were not recoverable by the laws of said country. This provision was held to be in conflict with the Fourteenth Amendment.

In *Burrows* v. *Brooks* (Sup. Ct. of Mich., 1897), 71 N. W. Rep., 460, the statute of that state exempting only certain enumerated property, not exceeding $500 in value, where the execution was issued on a judgment for

labor, other than professional services, was held unconstitutional, as special legislation.

In *Middleton* v. *Middleton*, 54 N. J. Eq. 692 (35 At. Rep., 1065), it was held that an act permitting a limited divorce for adultery or desertion, attended by special consequences with regard to property rights, on the application of a person holding conscientious scruples against absolute divorce, and not otherwise, was contrary to the spirit of the constitution of the state and of the United States. It was said in the opinion:

"Where a different result is provided for dereliction on the part of one person from that which is attached to the same dereliction on the part of another there is a discrimination applied to that offender which is contrary to the spirit of the constitution of this state and of the United States. Such discrimination can only, if at all, escape from that position of repugnance by being made to apply to a class so large, so consciously entered into, and so certainly defined that the classification is either originally patent or deliberately accepted by the members of it."

In *State ex rel.* v. *Sheriff of Ramsey County*, 48 Minn., 236 (51 N. W. Rep., 112), it was held that classification could not be arbitrarily made; that a statute must treat alike all of the class to which it applies, and must bring within its classification all who are similarly situated or under the same conditions; that the classification attempted to be made in the act of the legislature of Minnesota declaring the emission of dense smoke within the City of St. Paul a nuisance, under certain conditions, was arbitrary, unauthorized, and unconstitutional, because it did not apply to certain others under the same conditions.

The principle is further illustrated in cases holding those laws to be unconstitutional which prohibit barbers

alone from laboring on Sunday, or permit a certain class only to labor on such a day. In such cases it will be seen that no reason exists why one class should be prohibited, while all other are permitted to labor on such a day, and that the regulation of the business to be legitimate must refer strictly to matters wholly peculiar to such business and must not include matters which, in reason, would appertain as well to other businesses. Of course it might be said by some anxious to uphold any law, that it was "somewhat in the nature of a police regulation," having a tendency to restrict the happening of accidents, or perhaps a tired feeling in barbers.

In *Eden* v. *People*, 161 Ill., 296, a statute making it unlawful for a barber to do business on Sunday, where it did not apply to any other class of business, was held to be invalid, as depriving them of property without due process of law, and that the police power did not justify a statute making it unlawful for barbers to do business on Sunday, without including any other class of business, and that it is a judicial question whether a trade or calling is of such a nature as to justify police regulation. The opinion is quite elaborate, and a large number of Illinois cases bearing on the question of discriminating and class legislation are referred to with approval. On page 303 it is said:

"The Constitution of the United States says the state shall not deprive any person of property without due process of law, and our state constitution declares the same thing. What is understood by the term 'due process of law' is not an open question. 'Due process of law' is synonymous with 'law of the land,' and 'the law of the land' is 'general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals.'

Millet v. *People*, 117 Ill., 294. Is the act in question a law binding upon all the members of the community? A glance at its provisions affords a negative answer. The act affects one class of laborers, and one class alone. The merchant and his clerks, the restaurant keeper with his employes, the clothing house proprietor, the blacksmith, the livery stable keeper, the owners of street car lines, and people engaged in every other branch of business, are each and all allowed to open their respective places of business on Sunday and transact their ordinary business if they desire, but the barber, and he alone, is required to close his place of business. The barber is thus deprived of property without due process of law, in direct violation of the Constitutions of the United States and of this state."

While it may be said that that court has not always been consistent in the application of this rule, yet this is the general tenor of its recent decisions, as affirmed in the latest utterance of that court in *Lippman* v. *People of the State of Illinois*, 175 Ill., 101. The prosecution there was instituted under "An Act to protect manufacturers, bottlers and dealers in ale, porter, lager beer, soda, mineral water and other beverages, from the loss of their casks, barrels, kegs, bottles and boxes." It is said in the opinion:

"General laws have been defined to be those which relate to or bind all within the jurisdiction of the law-making power, while a special law is limited in the object to which it applies. It is often the case, however, that the rights and protection given by a law cannot be enjoyed by every citizen by reason of the subject to which the law relates. If the law is general and uniform in its operation upon all persons in like circumstances, it is general in a constitutional sense, but it must operate equally and uniformly upon all brought within the relation and circumstances for which it provides. * * * If an act should attempt to confer privileges only on persons of a certain stature it could be said to apply uniformly to all people answering such description, and yet it would be ab-

surd to say that such a law would be a general one. The classification must be so general as to bring within its limits all those who are in substantially the same situation or circumstances.'

"This act singles out one branch of a class of manufacturers and dealers who may have occasion to use, or who do use in their business bottles, barrels, kegs or other packages for their goods. It selects those whose particular manufacture or stock consists of certain varieties of drink. No other person who manufactures any product or sells it in casks, barrels, kegs, bottles or boxes can avail himself of the privilege of registering his trade-marks or of the consequent protection, but the act denies to him the privileges afforded to those named in the act. The grocer, farmer, fruit dealer, merchant, druggist or other dealer or manufacturer cannot avail himself of the privileges or remedy afforded by this act to protect himself against the loss of his property under the same circumstances. The purpose of this act, passed in behalf of the persons named in it, is not to recover bottles stolen, embezzled or fraudulently obtained by false tokens or pretenses, but to make the proceedings under it as to such persons a substitute for the action of replevin. The general search-warrant law of the state covers all the cases just mentioned, and was on our statute book when this act was passed. There are, and were, general laws in force applicable uniformly to all persons in the state for the recovery of personal property wrongfully obtained by another. This law was needless for that purpose, and it could only have been passed to give to the particular persons named in it additional privileges by making the criminal law supersede the writ of replevin."

In *Ex parte Jentsch*, 112 Calif., 468 (44 Pac. Rep., 803), it was held that a statute prohibiting barbers from carrying on business after 12 o'clock on Sunday or on a legal holiday, and applying to no other class of labor, was unconstitutional, as special, unjust and unreasonable, working an invasion of individual liberties; that a law is not always general because it operates upon all within a

class, but there must be back of that a substantial reason why it is made to operate only upon a class and not generally upon all.

The same ruling was made in *State* v. *Grammon*, 132 Mo., 326.

In *City of Tacoma* v. *Krech*, 15 Wash., 296 (46 Pac. Rep., 255), it was held that an ordinance prohibiting barbers from pursuing their calling for compensation on Sunday violates the constitutional inhibition against special or class legislation.

In *City of Shreveport* v. *Levy*, 26 La. Ann., 671 s. c., 21 Am. Rep., 553, it was held that a municipal ordinance, forbidding the sale of goods on Sunday, but excepting from its operation those keeping their business places closed on Saturday, was unconstitutional, as giving to Jews a privilege denied to others.

In *State* v. *Goodwill*, 33 W. Va., 179 (10 S. E. Rep., 285), a statute which made it unlawful for persons, firms, corporations or associations engaged in any kind of mining or manufacturing to issue orders in payment of wages of their employes, was held void under constitutional provisions, on the ground that the statute was discriminatory in character, being confined to employers engaged in mining or manufacturing, and did not embrace all employers.

On similar grounds in the case of *State* v. *Fire Creek Coal & Coke Co.*, 33 W. Va., 188 (10 S. E. Rep., 288), a statute prohibiting employers engaged in mining or manufacturing from selling merchandise to their employes at a greater per cent. of profit than they sold to others not employed by them, was held unconstitutional.

See, also, *Low* v. *Rees Printing Co.*, 41 Neb., 127

(59 N. W. R., 362-365, 366 and 367), where the farmer was excepted from the operation of an eight-hour law.

The case of *Stratton's Claimants* v. *Morris' Claimants*, 89 Tenn., 497, also reported as *Dibrell* v. *Morris' Heirs* (Tenn.), 15 S. W. Rep., 87, involved the constitutionality of a statute which provided that on the *death* of a *non compos* intestate who had inherited property from a spouse, who died intestate, the property inherited should go to the next of kin of such spouse, to the exclusion of the next of kin of the *non compos*, while under the general law of distribution, property inherited by a spouse from an intestate spouse on the death of the former would be inherited by his or her next of kin and not by the next of kin of the latter. In an able and exhaustive opinion the law was held unconstitutional, and that the classification attempted to be made was arbitrary and not natural.

In *State* v. *Loomis*, 115 Mo., 307, an act of the legislature, applying only to persons or corporations engaged in manufacturing or mining, making it unlawful to issue, for the payment of wages, any order, check or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable, at its face value, in cash, or in goods, at the option of the holder, at the store or other place of business of the corporation, person or firm, was unconstitutional, because in violation of "due process of law" of the state and Federal constitutions.

So, also, as to an act requiring certain corporations to pay employes weekly.

Braceville Coal Co. v. *People*, 147 Ill., 66.

In *State* v. *Jackman* (Supreme Court of New Hampshire, 1898), 41 At. Rep., 347, an ordinance legally adopted pursuant to legislative authority, requiring under penalty the tenant or occupant, or, if there be no tenant, the owner of any building or lot bordering on any street where there is a sidewalk, to cause all snow to be removed from the sidewalk adjoining his premises within a certain time, was held unconstitutional, as in effect unequal taxation, since the statute, among other things, imposed the duty on municipalities to keep the sidewalks unobstructed from snow, and to meet such duties they were empowered to raise such sum as they should judge necessary for each year, to be assessed on all polls and estate subject to taxation therein; that the ordinance was invalid as a denial to the persons on whom it operated of the equal protection of the laws, within the Fourteenth Amendment. It is said in the opinion:

"'An act which operates on the rights of property of only a few individuals, without their consent, is a violation of the equality of privileges guaranteed to every subject.'"

It is further said:

"But even the police power, comprehensive as it admittedly is, has its limitations, and in this state, at least, it is subordinate to the equality of privilege and of burden secured by the bill of rights and guaranteed by the constitution, in clearly-expressed provisions, which mean just what they declare."

The Police Power.

It seems to have become fashionable, when other reasons fail to sustain class legislation, to simply assert that the legislature intended the law as an exercise of the

police power; and because this power has never been definitely defined thereby put an end to argument. So the Supreme Court of Kansas in this case cavalierly swept all objections aside by simply asserting:

"Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy afforded is one the legislature has the right to give in such cases."

In none of the authorities cited in the opinion was the question now presented even considered.

It would now seem to be considered by some courts that not only is the police power above and superior to the constitution, but that there exists a *quasi* police power or a *quasi* police regulation, which is also beyond the pale of the constitution.

Wherein is this statute "*somewhat* in the *nature* of a police regulation?" What *regulation* is prescribed? None whatever is pointed out. None exists. A proper police regulation will prescribe definite precautions to be taken, or the manner or method of carrying on a business or of using property, which, when observed, will be reasonably calculaled to prevent injury to the health, morals or safety of the public in general. All that may be rationally discovered in this statute in the way of regulation is that regarding the litigation, and dependent solely on the result of the action. Is a penalty upon the right to litigate or defend a doubtful controversy a police regulation? If so, then should not the same penalty be inflicted upon all persons in such cases, including the plaintiff? But this would be a novel

application of the police power. Better say, with the Texas court, it is an exercise of political power. It is a mistake to say that the police, or any other power of the state, is superior to the constitution, particularly that provision which condemns partial laws and guarantees to all equal protection, and forbids the unequal imposition of penalties. It may be true that in some cases general language is used to the effect that this Amendment was not designed to prohibit a lawful exercise of the police power by the states; but when we come to examine the opinions we will readily understand the language, and find that on the contrary the police power cannot be exercised by partial legislation and unequal laws. The cases in which such general language was used were cases in which the law in question operated on all persons equally under like circumstances in the state or in the locality to which it was applicable. The portion of the amendment referred to is broad and general. It is a prohibition upon every power which may be exercised by the state. More concise and at the same time more comprehensive language could not have been used.

This court has decided, in *Yick Wo* v. *Hopkins*, 118 U. S., 356, that the exercise of the police power is subject to this amendment.

Again, in *Chicago, &c., R. R. Co.* v. *Minnesota*, 134 U. S., 418, 458; and *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S., 362, 399, 410, both concerning regulation of rates and the exercise of the police power of the state to prohibit extortion, this court decided that the power could not be exercised unequally, or in such a manner as to deny any person or class of persons the equal protection of the laws.

To the same effect was *Ritchie* v. *The People*, 155 Ill., 98.

In *re Jacobs*, 98 N. Y., 98, in an elaborate opinion written by Judge Earl, it was held that "An Act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses in certain cases" was unconstitutional, as depriving the owner of property without due process of law; that while generally it is for the legislature to determine what laws are required to secure the public health, comfort and safety, yet under the guise of police regulations it may not arbitrarily infringe upon personal or property rights, and its determination as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts; that when the legislature passes an act ostensibly for the public health, but which does not relate to or is inappropriate for the purpose, and which destroys the property or interferes with the rights of citizens, it is within the province of the court to determine this fact and to declare the act violative of the constitutional guarantees of those rights.

In *People* v. *Gilson*, 109 N. Y., 389, the statute of that state making it a misdemeanor for any person who sells food to give away therewith as a part of the transaction of sale any other thing as a premium, gift, etc., was held to be in violation of the constitutional provision which secures to each person his liberty and property, and not within the proper exercise of the police power of the state, either to protect the public health and safety or to prohibit lotteries or to regulate trade, nor was it a valid exercise of legislative power to enact what shall amount to a crime. Judge PECKHAM, speaking of the police power, said:

"That power has never yet been fully described, nor its extent plainly limited, further, at least, than this: *It is not above the constitution, but it is bounded by its provisions*; and, if any liberty or franchise is expressly protected by any constitutional provision, it cannot be destroyed by any valid exercise, by the legislature or the executive, of the police power. * * * The legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the constitution of this state; and that, if the legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the courts."

For a recent application of the doctrine see *Colon* v. *Lisk*, 153 N. Y., 188, where a number of New York cases are referred to.

This court has simply held that a legitimate and proper exercise of the police power under general laws does not "deprive a person of liberty or property;" but it has also held that if the power be exercised unequally, or under a law which is unequal and partial in its operation, denying to any class of persons the equal protection of the laws, it does violate the equality clause of this amendment. The distinction is apparent. No one has such an absolute right in property that he may use it in any manner even to the injury of others, and it may be admitted that no one has an absolute property right in a trade or calling to conduct it in any manner even though it may injure others. It may be admitted that it is a principle of the common law and of general jurisprudence that everyone must so use his own as not to injure the property or rights of another. *Sic utere tuo ut alienum non laedas* is the maxim which is properly invoked as the basis of the exercise of the police power justifying police regulations, but only to such

extent are such regulations justifiable or valid. This is set forth in Judge Redfield's opinion in the leading case of *Thorp* v. *Rutland & B. R. R. Co.*, 27 Vt., 154, which involved the validity of a statute which required all railroads to be fenced and imposed a liability in damages for failure to do so But such a law was justified solely as affording protection against injury to the traveling public. It prevented accidents to trains.

So, in *Crowley* v. *Christensen*, 137 U. S., page 90, it was said by Mr. Justice FIELD:

"And as to the enjoyment of property the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas* is a maxim of universal application."

So a traffic or business may become so dangerous to the morals or health of the community in general as to require either its prohibition altogether, or that it shall be carried on in a certain manner under certain regulations and certain prescribed precautions to obviate the evil.

Thus, in *Mugler* v. *Kansas*, 123 U. S., 623, which involved the prohibitory liquor law of Kansas, it was said by Mr. Justice HARLAN, on page 663:

"Undoubtedly the state, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government."

And on page 665 he said, speaking of the Fourteenth Amendment:

"It has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held

under the implied obligation that the owner's use of it shall not be injurious to the community."

So, in the early oleomargerine case of *Powell* v. *Pennsylvania*, 127 U. S., 678, in the absence of evidence and a showing to the contrary, it was deemed that the statute of Pennsylvania which prohibited every person, firm or corporate body from manufacturing at all any oleaginous substance or any compound of the same other than that produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, or to sell the same, was a legitimate exercise of the police power passed for the purpose of preventing frauds upon the community; that the offering for sale of such a substance in imitation of butter, for the genuine article, would operate as a fraud.

These laws were all general and operated alike upon every person in the community. Much deference was, no doubt, paid to the ostensible wisdom, knowledge and good faith of the legislature in passing such a law. It would seem from the New York case, such a law was probably passed at the instance and for the purpose of protecting farmers and dairymen in their business, as, no doubt, the sale of oleomargerine made great inroads upon their profits by causing a reduction in the price of butter. This was one method of stifling competition.

In the case of *People* v. *Marx*, 99 N. Y., 377, which involved a somewhat similar law of New York, much scientific testimony, now found in standard works, was produced to show that the article was not deleterious to health, and thereupon the law was held invalid. On page 387 it is said:

"Measures of this kind are dangerous even to their promoters. If the argument of the respondent in sup-

port of the absolute power of the legislature to prohibit one branch of industry for the purpose of protecting another with which it competes can be sustained, why could not the oleomargarine manufacturers, should they obtain sufficient power to influence or control the legislative councils, prohibit the manufacture or sale of dairy products? Would argument then be found wanting to demonstrate the invalidity under the constitution of such an act? The principle is the same in both cases. The numbers engaged upon each side of the controversy cannot influence the question here. Equal rights to all are what are intended to be secured by the establishment of constitutional limits to legislative power, and impartial tribunals to enforce them."

In excepting any case from the broad and general provisions of the Amendment, as the exception is created by judicial construction, it necessarily becomes a judicial question to determine (if the statute be general and equal in its operation upon all under similar circumstances), whether it is a ligitimate exercise of police power, and whether the law is reasonable as a regulation or a prohibition—whether the regulation or prohibition is reasonably, or rationally calculated to protect the public health, morals, or safety.

Lawton v. *Steele*, 152 U. S., 137.

This rule was certainly applied in the case of *Holden* v. *Hardy*, 169 U. S., 366

The purpose or every statute must be determined from the language and terms of the statute itself and the manifest result thereof. In determining this purpose, this court is not bound or concluded by what the state court may have conceived such purpose to be by some surmise or something not apparent upon the face of the statute. The object and result of this statute is simply to impose a penalty upon railroad companies alone, when unsuccessful

in resisting an ordinary action for damages, on account of fire, based upon a disputed claim, while all other persons and classes in the community may resist similar actions for damages in good or bad faith without risking the imposition of such a penalty. The apparent purpose is to deter railroad companies from litigating or contesting such claims.

It is true in some early cases, statutes imposing attorney's fees upon a defendant have been sustained, as is said in the nature of a penalty for violating some statutory provision or regulation. In none of these cases was the Fourteenth Amendment invoked, nor does any distinction seem to have been pointed out as to the real nature and object of such provisions and the result of such statutes.

In the early cases of *Kansas Pacific R. R. Co.* v. *Mower*, 16 Kas., 573, decided in 1876 by a court then composed of very able judges, the statute of that state requiring all railroads to be fenced and imposing a liability in damages and an attorney's fee in favor of plaintiff, when a demand was made as required by the act and the company for thirty days failed to pay, was held to be a police regulation for the safety of the traveling public, and that the provision in regard to attorney's fees was not in contravention of the Kansas Constitution. The requirement to fence was no doubt a police regulation. It is simply said in the opinion that it is no uncommon thing for a legislature to provide "in cases *where failure to pay seems to imply more than ordinary wrong* that such a failure should carry with it something in the nature of a penalty;" that sometimes double or treble damages are given; that in such cases the claims are uniformly small so as not to justify litigation; and this is about all that was said. The learned judge who

delivered that opinion has by no means stopped in intellectual growth, and we believe will be free to reconsider the matter. We have no doubt that when the question is again presented he will admit that attorney fees do not naturally or proximately flow as damages from the original wrong, but are simply a consequence of litigating a disputed controversy—that they are imposed as a penalty for, and to deter, litigation; and the fact that such claims are usually small would afford no justification for a partial law, but the same penalty should apply as the result of resisting all small claims as was held in the Ellis case. But in the above case, as elsewhere, there was a violation of a reasonable statutory requirement. However, a failure or refusal to pay a questionable claim can imply no wrong whatever.

Again, in *Peoria, D. & E. Ry. Co.* v. *Duggan*, 109 Ill., 537, decided in 1884, a similar ruling was made, but for some reason or other the Fourteenth Amendment was not invoked or considered. Possibly the attorneys did not understand that corporations were "persons" within the intendment of the amendment. All that was said in that case upon the point was:

"This provision may be upheld as being in the nature of a penalty for non-compliance with the statutory duty of fencing. The requirement of the fencing of railroad tracks is not alone for the private benefit of the owners of stock along their line, but it has respect to the public welfare as well, as a measure for the safety of travel on railroads. As a police regulation for the promotion of the public safety in that respect, the legislature may well require the fencing of their railroad tracks by railway companies, and provide penalties for securing performance of the duty."

Here there was no consideration of the real question involved, but even here it is simply taken for granted

and justified as a penalty for non-compliance with a statutory duty or requirement for the safety of the traveling public. In the case at bar the penalty is solely for the benefit of a private claimant.

Again, in *Perkins* v. *St. Louis, I. M. & S. Ry. Co.*, 103 Mo., 52, in considering a similar statute and a similar provision for attorney's fees, the only question raised and decided was as to the provisions of the state constitution, and the court seems to take it for granted that the attorney's fee is a penalty imposed for failure to fence, the same as a provision giving double damages, whereas there is a manifest distinction. But an authority is only good in so far as it is based upon reason.

However, as the question of negligence is often for the jury, and in some cases, even though there be no conflict in the evidence on that point, since the legislature has not prescribed any specific precaution to be adopted, it is clear the defendant ought not to be punished with a penalty because a jury may find it guilty. Because the law is uncertain as to what the defendant should have done, and often a jury alone can determine the question, the result varying with the character of the particular jury, does not this statute attempt to impose a penalty without creating an obligation or prescribing a regulation?

In *L. & N. Rld. Co.* v. *Commonwealth*, 99 Ky., 132 (35 S. W., 129), a statute providing that if any railroad corporation shall charge more than a just and reasonable rate of toll it shall be guilty of extortion, and fixing a penalty therefor, was held void for uncertainty in that it failed to prescribe a standard as to what is just and reasonable by which the carrier can regulate its conduct; that in effect it was a taking of property without due process of law.

See, also, Mr. Justice Brewer's remarks in *Tozer* v. *U. S.*, 52 Fed., 917; see, also, *L & N. Rld. Co.* v. *Rld. Commrs.*, 16 Am. & Eng. Rld. Cos., 15. The same reasoning would apply if the fee be regarded as a penalty for alleged negligence dependent on the opinion of a jury.

Clearly the police or any other power may not be exercised under partial or discriminating laws which deprive any person or class of persons of the equal protection accorded to others under the general laws. Nor can any class of defendants or litigants be denied the right of access to the courts or a hearing upon terms different from other classes of litigants.

Classification.

It seems to be loosely stated in some cases that the legislature may classify persons for the purpose of passing laws, and some courts have assumed that the legislature having made a classification, its judgment is conclusive, and judges cannot inquire into the reasonableness thereof. Too much deference is sometimes paid to the supposed good judgment or fairness of some legislatures. The judiciary, this court in particular, has been created, so placed and protected by constitutional provisions with the direct object and for the great purpose of protecting the individual against unconstitutional laws or unconstitutional exercises of power. It is to jealously guard each constitutional provision, and to pay deference rather to the rights of persons than jeopardize them by too great a display of etiquette towards some other agency of government. One of the great objects and purposes of the Amendment was to prevent class or discriminating legislation—legislation which simply classifies persons for the

purpose of inflicting penalties or burdens upon such class alone. This is apparent from the history of the Amendment.

Since this court has repeatedly held that corporations are "persons" protected by the amendment, therefore no distinction or discrimination can be made on account of or based upon the corporate character of such defendants.

Classification, if really necessary to be made by laws to protect the public, should be directed to objects, not to persons, and so that all shall be alike affected under substantially similar facts or circumstances, or for similar reasons. Statutes, for instance, which require all railroads to be fenced and impose liability in double damages upon the owner thereof for injury resulting from failure to do so, may be upheld upon the ground that every person owning or operating a railroad is alike affected in carrying on such business by a regulation intended for the protection of the traveling public. The same liability is imposed upon all under the same facts or circumstances. The court is able to see from its general knowledge that there is no person who is not alike affected under substantially similar circumstances. But where the statute makes no regulation or requirement as to what precaution shall be adopted in such business, but attempts to impose upon a class of persons alone a penalty for the right to contest a controverted question of liability, when no such penalty is imposed upon the plaintiff or upon other defendants in similar actions, the reason fails.

The Supreme Court of Kansas, in *Missouri Pacific Ry. Co.* v. *Merrill* 40 Kas., 404, gave as the test:

"The fact that all persons and corporations brought under its influence are subject to the same duties and

liabilities under similar circumstances disposes of the objections raised."

This is a false test, as will be readily seen. Suppose a law provided that every negro discovered with a chicken under his arm should be deemed guilty of larceny and punished by fine and imprisonment. Here all persons (negroes) brought under its influence are subjected to the same penalties under similar circumstances.

In *Johnston* v. *St. Paul & D. Ry. Co.*, 45 N. W., 156 (Supreme Court of Minnesota), Judge MITCHELL raid:

"Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike under the same conditions all who are brought 'under its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some difference in the nature of that employment, and can only extend to cases where such difference exists."

For instance, in *Chicago, &c., Ry. Co.* v. *Minnesota*, 134 U. S., 458, it was said:

"And in so far as it (the railroad company) is thus deprived while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

So in the case at bar, where the company will be deprived of its money under the judgment for attorney's fees, while all others in like actions and cases are not so deprived, it will be denied the equal protection of the laws.

Mr. Justice BREWER stated in the Ellis case in language which has been since quoted with approval:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

In other words, it is for the court to determine from its general knowledge whether the attempted classification, whatever it be, whether a classification of objects, trades, professions or persons, is sufficiently broad, so that every person in the community will in fact be alike affected under the law in question under similar facts or circumstances, and whether the same is reasonable and necessary in carrying out a public purpose. Anything short of this is contrary to the spirit of the Amendment.

In *Barbier* v. *Connolly*, 113 U. S., 27, a case which seems to have lead to some misunderstanding, there was a direct prohibition against carrying on a dangerous business within defined limits, affecting everyone under like circumstances. It was a regulation of a business. There, a municipal ordinance prohibited from washing and ironing in public laundries and wash-houses within defined territorial limits from 10 o'clock at night to 6 in the morning. This was held to be purely a police regulation, rendered necessary on account of the danger of carrying on such work in such locality between such hours. Mr. Justice FIELD delivered the opinion, and his language should be considered in the light of other expressions used by him in other cases. He said, on page 31:

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country, for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts;* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

After speaking of legislation of a special character prescribing regulations to promote the health, morals and good order of the public, he continued:

"Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similiarly situated, is not within the amendment."

But no classification of any kind is valid which would have the effect of depriving any class of a substantial right in respect to person or property. A fundamental right in these respects, as we have seen, is that of answering and defending against the charge which would seek to

affect the one or the other by the sentence or judgment of the court. The exercise of this right is not conditional as to terms not equally imposed on all classes. Where a condition is imposed as dependent on the result in one case, it must likewise be imposed where there is a similar result in all other cases. Otherwise, one class is denied the equal protection of the laws—that is, a right to resort to the courts for the protection of person or property on equal terms with others.

However, passing by this insuperable objection, how does it aid this statute, in considering it as simply classifying cases or actions? Even then, it affects actions against a single class of persons for damages caused by fire. Now, wherein does such an action against such a class for such damages reasonably differ from a similar action against other classes for similar damages, and why should a penalty be attached dependent on the result in one case which is not imposed where there is a similar result in the other cases? After all, is it not narrowed down again to a classification simply of persons?

Still, as the right to the fee is dependent upon the bringing of the action, and the amount thereof upon the approximate resistance, it does not attach unless the railroad company, by its refusal to pay the demand, removes the controversy into court and insists upon its right to defend. It seems, then, too clear for argument that the penalty is imposed solely as the result of defending or of asserting this right. Is it a moral or legal wrong in one class of persons to defend against such actions, which is not equally so in other classes defending against similar actions?

In this theory of classification lies the great danger. Ingenious and cunning will be the phraseology used and

the distinctions sought to be made by statute; but the result will be the same. The statute will, in its practical operation, affect but a single class of persons. This will be the weapon for assault against the fundamental rights, liberty and property of the unfortunate minority and the right to the same protection enjoyed by the majority under the laws. Admit that a classification may be made of persons, or an unreasonable one in respect to a trade or object beyond the challenge of the courts, simply for the purpose of imposing, or resulting in the imposition of, penalties or unjust burdens upon a single class under partial laws,—assaults will successfully follow, until the very spirit of the Amendment will be crushed, and there will be little left for it to practically protect.

The provision of the Amendment is wise and just in its full scope. Courts should not approach and interpret it in that conservative spirit which construes a statute in derogation of a common right. Rather invoke the spirit and apply the methods of the great Marshall, and there will be little danger that such a provision will lose any of its virility.

Conclusion.

The law in question is simply a piece of machinery, invented for the more speedy collection of a certain character of claims against railroad companies. The judgment in this case is not all that is involved. An unjust and an unequal law imposes a burden which is constantly felt and a penalty which is frequently imposed alone upon a small class of corporations in certain cases. It involves the integrity of one of the greatest constitutional provisions in our government, and the decision which is

made in this case will have to be followed and applied in cases which affect citizens themselves. The great purpose and intent of that provision, so manifestly just, but secured only after a long struggle, should not be construed away. When would we obtain another such provision and in what better language could it be put to accomplish the purpose for which this Amendment was plainly designed by its framers.

We may fittingly close with a quotation from the eloquent language of one who in his lifetime is easily ranked among the great jurists this country has produced. In his Laws and Jurisprudence in England and America, on pages 211 and 215, Judge Dillon says:

"It was the set purpose that its prohibitions were directed to any and every form and mode of state action—whether in the shape of constitutions, statutes or judicial judgments—that deprived any person, white or black, natural or corporate, of life, liberty or property, or of the equal protection of the laws. Its value consists in the great fundamental principles of right and justice which it embodies and makes part of the organic law of the nation. No person is wise enough to foresee the baneficence of the future operation of these principles, if the courts are true and firm in maintaining this amendment in its full scope and purpose. I believe it will hereafter more fully than at present be regarded as the American complement of the Great Charter, and be to us—as the Great Charter was and is to England—the source of perennial blessings.

"The Fourteenth Amendment, while it does not deprive the states of their autonomy or of their power, subject to the Federal Constitution, to regulate their domestic concerns, does nevertheless in the vital matters specified in that amendment operate as an express limitation upon the powers of the states. It puts life, liberty and property upon precisely the same footing of security. It binds them each and all indissolubly together. It places each and all of these primordial rights under the aegis and protection of the

National Government. By this provision they are each and all adopted as national rights. Under the Fifth Amendment they are each protected from invasion by Congress or the Federal Government. By the Fourteenth Amendment they are each protected from invasion by state legislatures, or by the people of the states, in any form in which they may attempt to exercise political power. If these rights are not safe and secure, it is because, and only because, of the essential infirmity of constitutional limitations of the most peremptory character. This we cannot admit. The Fourteenth Amendment, in the most impressive and solemn form, places life, liberty, contracts and property, and also equality, before the law among the fundamental and indestructible rights of all the people of the United States.

"It sets the seal of national condemnation upon Proudhon's famous maxim that 'property is theft;' 'property holders are thieves.' This pernicious doctrine has hitherto found no general acceptance among our people or their legislators, and under the constitution, as it now stands, this doctrine can obtain no foothold as to any species of property—if the courts are faithful to their high trust as the guardians and defenders of the constitution. Bear in mind ever that this, like all other provisions of the constitution, was put into the constitution 'to be enforced by the judiciary as one of the departments of the government, established by the consitution.' The value, however, of these constitutional guaranties wholly depends upon whether they are fairly interpreted and justly and with even hand fully and fearlessly enforced by the courts. * * * If there is any problem which can be said to be yet unsettled, it is whether the bench of this country, state and federal, is able to bear the great burden of supporting under all circumstances the fundamental law against popular, or supposed popular demands, for enactments in conflict with it. It is the loftiest function and the most sacred duty of the judiciary, unique in the history of the world, to support, maintain and give full effect to the constitution against every act of the legislature or the executive in violation of it. This is the great jewel of our liberties. We must not, 'like the base Judean, throw a pearl away richer

than all his tribe.' This is the final breakwater against the haste and passions of the people, against the tumultuous ocean of democracy. It must at all costs be maintained. This done, and all is safe; this omitted, and all is put in peril and may be lost."

In note 1, page 215, he quotes from Judge Cooley's address to the bar of South Carolina in 1886:

"The habit of mind which consents to the doing of constitutional wrong, when it is supposed some temporary good may be accomplished, should be recognized as a foe to constitutional limitations and securities, and which, therefore, at any cost, must be corrected."

We respectfully submit that the statute of Kansas, under which an attorney's fee in this case was awarded, is unconstitutional, and the judgment of the Supreme Court of Kansas in respect to such fees should be reversed.

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